(8)

No. 03-1407
Title: Richard Gerald Rousey, et ux., Petitioners
v.
Jill R. Jacoway
Docketed: April 8, 2004
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (02-3505)
Decision Date: October 20, 2003
Rehearing Denied: January 9, 2004
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Apr 6 2004	Petition for a writ of certiorari filed. (Response due May 10, 2004)
May 10 2004	Brief of respondent Jill R. Jacoway in opposition filed.
May 18 2004	DISTRIBUTED for Conference of June 3, 2004.
May 19 2004	Reply of petitioners Richard Rousey, et ux. filed. (Distributed)
Jun 7 2004	Petition GRANTED.
Jul 19 2004	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including August 11, 2004.
Jul 19 2004	Extension of time within which to file respondent's brief on the merits to and including October 5, 2004.
Aug 2 2004	Further extensions of time within which to file briefs on the merits. The joint appendix and petitioners' brief are due on or before August 20, 2004. The brief of respondent is due on or before October 22, 2004.
Aug 19 2004	Motion to dispense with printing the joint appendix filed by petitioners.
Aug 20 2004	Brief of petitioners Richard Gerald Rousey and Betty Jo Rousey filed.
Aug 20 2004	Brief amicus curiae of AARP filed.
Sep 28 2004	Motion to dispense with printing the joint appendix filed by petitioners GRANTED.
Sep 29 2004	SET FOR ARGUMENT ON Wednesday, December 1, 2004.
Oct 1 2004	CIRCULATED.
Oct 21 2004	Further extension of time within which to file respondent's brief on the merits to and including October 25, 2004.
Oct 22 2004	Brief of respondent Jill R. Jacoway filed. (Distributed)
Oct 28 2004	Record received from U.S.C.A. 8th Circuit. (1 envelope)
Nov 22 2004	Reply of petitioners Richard Rousey and Betty Jo Rousey filed. (Distributed)
Nov 23 2004	Record received from U.S. Bankruptcy Court W. Dist.of Arkansas. (1 fold and 1 CD containing electronically filed proceedings)
Dec 1 2004	Argued. For petitioners: Pamela S. Karlan, Stanford, Calif. For respondent: Colli C. McKiever, Fayetteville, Ark.

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No. 03-___

IN THE

Supreme Court of the United States

Richard Gerald Rousey and Betty Jo Rousey,
Petitioners,

v.

Jill R. Jacoway.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant certiorari to resolve the three-way circuit conflict over whether and to what extent Individual Retirement Accounts (IRAs) are exempt from a bankruptcy estate under 11 U.S.C. 522(d)(10)(E)?

PARTIES TO THE PROCEEDINGS BELOW

The only parties to this proceeding are named in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Richard Gerald Rousey and Betty Jo Rousey respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1a-6a) is published at 347 F.3d 689. The Eighth Circuit's order denying the petition for rehearing and rehearing en banc by a vote of five to four (Pet. App. 36a) is unpublished. The opinion of the Bankruptcy Appellate Panel for the Eighth Circuit (Pet. App. 7a-18a) is published at 283 B.R. 265. The opinion for the Bankruptcy Court for the Western District of Arkansas (Pet. App. 19a-35a) is published at 275 B.R. 307.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2003. A timely petition for rehearing and rehearing en banc was denied on January 9, 2004. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

11 U.S.C. 522 provides, in relevant part:

(d) The following property may be exempted under subsection (b)(1) of this section:

*****

(10) the debtor's right to receive—

*****

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the

support of the debtor and any dependent of the debtor, unless –

> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
>
> (ii) such payment is on account of age or length of service; and
>
> (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

STATEMENT

When a debtor files a bankruptcy petition, virtually all of the debtor's property becomes part of the bankruptcy estate, which the bankruptcy trustee will convert to cash and distribute to the debtor's creditors. See 11 U.S.C. 541; *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 641 (1992). A debtor may, however, seek to retain some of his property by claiming an exemption pursuant to 11 U.S.C. 522. See *Taylor*, 503 U.S. at 641. These exemptions "permit an individual debtor to take out of the [bankruptcy] estate that property that is necessary for a fresh start and for the support of himself and his dependents." H.R. Rep. No. 95-595, at 176 (1977).

One such exemption encompasses a debtor's right to receive payments under a "stock bonus, pension, profitsharing, annuity, or similar plan or contract" so long as the receipt of the payments is "reasonably necessary for the support of the debtor and any dependent of the debtor." 11 U.S.C. 522(d)(10)(E). The question presented by this case – a question that has given rise to an entrenched three-way split among the courts of appeals – is the extent to which payments from an Individual Retirement Account (IRA) can constitute "exempt property" under this provision. The Eighth Circuit, acknowledging a square circuit conflict, held that seemingly

all IRAs cannot as a matter of law qualify for the exemption provided by Section 522(d)(10)(E).

1. Petitioners Richard and Betty Jo Rousey are a husband and wife who jointly filed a voluntary Chapter 7 petition in the United States Bankruptcy Court for the Western District of Arkansas. Pet. App. 2a. Pursuant to Section 522(d), petitioners sought an exemption for two IRAs having a total value of $55,033.48. *Id.* The IRAs had been funded entirely by the proceeds of Mr. Rousey's pension and Mrs. Rousey's 401(k) plan, which petitioners had accumulated while employed by Northrop Grumman Corporation. *Id.* at 12a. At the termination of their employment, petitioners had simply "rolled over" their pension and 401(k) plans into the IRAs.[1] *Id.*

The trustee did not object to petitioners' exemption of $10,681 of the IRAs' value pursuant to 11 U.S.C. 522(d)(5).[2] Pet. App. 24a. The trustee did, however, file a motion objecting to petitioners' exemption of the remaining $44,352.48 pursuant to 11 U.S.C. 522(d)(10)(E) and requesting turnover of this additional amount. *Id.* at 19a, 24a. The bankruptcy court sustained the trustee's motion, holding that these funds were not exempt because the IRAs were not a "similar plan or contract" within the meaning of Section 522(d)(10)(E). *Id.* at 34a. It based this holding on the fact that petitioners could withdraw funds (albeit subject to a 10% tax penalty, see 26 U.S.C. 72(t)(1)), before they reached the

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[1] Petitioner Richard Rousey's IRA contained $42,915.32; petitioner Betty Jo Rousey's IRA contained $12,118.16. Pet. App. 2a.

[2] Section 522(d)(5) provides, in pertinent part, that a debtor can exempt from the bankruptcy estate his "aggregate interest in any property, not to exceed in value $975 plus up to $9,250 of any unused amount of the exemption provided" elsewhere in the subsection for the debtor's residence or a burial plot (see 11 U.S.C. Section 522(d)(1)). The bankruptcy court's ruling under Section 522(d)(5) is not before this Court.

age (59½) at which IRA holders are eligible for payments under federal law. Pet. App. 34a.[3] Furthermore, according to the court, the early-withdrawal possibility meant that payments from petitioners' IRAs would not be made "on account of illness, disability, death, age, or length of service." *Id.* at 35a.

On appeal, the bankruptcy appellate panel affirmed on both grounds. Pet. App. 17a. A concurring opinion, however, urged the Eighth Circuit to revisit its prior precedent holding that IRAs are ineligible to be exempt property. The concurrence emphasized that, although petitioners' retirement funds unquestionably would have been exempt had petitioners filed for bankruptcy while employed by Northrop Grumman, the same funds were no longer exemptible merely because petitioners had to roll them over when they left the company. *Id.* at 18a.

2. The Eighth Circuit affirmed, although only on one of the two grounds invoked by the lower courts. Pet. App. 5a-6a. In contrast to the bankruptcy court and the bankruptcy appellate panel, the court of appeals agreed with petitioners that an IRA is a "similar plan or contract" within the meaning of Section 522(d)(10)(E). *Id.* at 5a. The Eighth Circuit recognized that, like a pension, the funds in petitioners' IRAs were "established over time as part of a long-term retirement strategy" and "serve[d] as a substitute for future earnings." *Id.* The court of appeals noted that four other circuits had found IRAs to satisfy the "similar plan or contract" test and that "dicta from the Supreme Court's opinion in *Patterson* [v. *Shumate*, 504 U.S. 753 (1992)] support this conclusion." Pet. App. 4a-5a (citing *Dettmann* v. *Brucher (In re Brucher)*, 243 F.3d 242 (CA6 2001); *Farrar* v. *McKown*, 203 F.3d 1188 (CA9 2000); *Dubroff* v. *First Nat'l Bank of Glens Falls (In re Dubroff)*, 119 F.3d 75 (CA2 1997); *Carmichael* v. *Osherow (In re Carmichael)*, 100 F.3d 375 (CA5 1996)).

[3] Petitioners' IRAs met the criteria for favorable tax treatment under Section 408 of the Internal Revenue Code. See Pet. App. 26a (noting that the question for the court was how 522(d)(10)(E) "applied to IRAs that qualify for tax-exempt status under § 408").

But based on prior Eighth Circuit precedent construing a nearly identical state exemption statute, the court of appeals held that the IRAs were nonetheless not exempt. Under that precedent, IRAs do not meet the requirement that any payments be made "on account of * * * age." 11 U.S.C. 522(d)(10)(E). "[F]uture payments from the corpus of an Individual Retirement Annuity are not 'on account of age' where debtors have unfettered discretion to withdraw from the corpus at any time subject only to modest early withdrawal tax penalties." Pet. App. 6a (quoting *Huebner* v. *Farmers State Bank*, 986 F.2d 1222, 1225 (CA8), *cert. denied*, 510 U.S. 900 (1993)).

The court of appeals specifically "recognize[d] that four of our sister circuits have reached a contrary result that may be more consistent with the purposes of § 522," but nevertheless deemed itself "constrained" by circuit precedent to reject that contrary view. Pet. App. 6a.

Petitioners timely sought rehearing and rehearing en banc. Their petition was denied by a five-to-four vote, with Judges Bye, Riley, Melloy, and Smith voting to rehear the case en banc. Pet. App. 36a.

This petition followed.

REASONS FOR GRANTING THE WRIT

The circuits are intractably divided into three camps over whether and to what extent payments from IRAs can be exempt from a bankruptcy estate under 11 U.S.C. 522(d)(10)(E). Given the large and increasing number of personal bankruptcies and the growing popularity of IRAs, such a conflict is untenable; the question presented affects tens or even hundreds of thousands of individual bankruptcy petitions per year and fundamentally alters the lives of the people who file them. This case presents the ideal vehicle to

resolve the questions raised by the three-way circuit split: first, whether payments from IRAs are exempt; and second, whether such an exemption extends to the corpus out of which future payments will be made as well as to those payments currently being made. Finally, certiorari is also warranted because the Eighth Circuit's decision is wrong on the merits.

I. The Courts of Appeals Are Intractably Divided Over the Question Presented.

Under Section 522(d)(10)(E), a debtor is entitled to exempt from the bankruptcy estate the "right to receive * * * a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract, on account of illness, disability, death, age, or length of service."[4] Each of the lower courts in this case has recognized that its holding that petitioners' IRAs are not exempt from the bankruptcy estate under Section 522(d)(10)(E) squarely conflicts with the law in four other circuits. See Pet. App. 6a; *id.* at 14a-15a; *id.* at 27a-28a. The Third and Eighth Circuits are the only two circuits in which debtors like petitioners are categorically denied exemptions for their future IRA payments, regardless of need. The rules in these two circuits are different, although both are equally erroneous and both would produce the same result in petitioners' case.

1. The Second, Fifth, Sixth, and Ninth Circuits have interpreted Section 522(d)(10)(E) to permit exemptions for payments from IRAs. See *Dettmann* v. *Brucher (In re*

[4] The amount of the exemption is limited "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." 11 U.S.C. 522(d)(10)(E). Because each of the courts below held that payments from IRAs were not exempt from the bankruptcy estate pursuant to Section 522(d)(10)(E), none addressed whether the amount of the exemption petitioners sought was "reasonably necessary" for their support, and that issue is not before this Court.

Brucher), 243 F.3d 242, 242 (CA6 2001) ("The sole question presented in this appeal is whether an Individual Retirement Account (IRA) can be excluded from a bankruptcy estate * * * pursuant to 11 U.S.C. § 522(d)(10)(E). Following the reasoning of three other courts of appeals, we answer the question 'yes.'"); *Farrar* v. *McKown (In re McKown)*, 203 F.3d 1188, 1190 (CA9 2000) ("We thus hold, like our sister circuits, that an IRA qualifies for exemption under statutory language tracking 11 U.S.C. § 522(d)(10)(E)."); *Dubroff* v. *First Nat'l Bank of Glens Falls (In re Dubroff)*, 119 F.3d 75, 78-80 (CA2 1997) (holding IRAs exempt under a New York state statute "similar in all respects material to our inquiry" to Section 522(d)(10)(E)); *Carmichael* v. *Osherow (In re Carmichael)*, 100 F.3d 375, 376 & n.1 (CA5 1996) (concluding that "IRAs are exempt under [Section 522(d)(10)(E)]" with the possible exception of some unspecified "specially tailored IRAs"). To the best of petitioners' knowledge, every bankruptcy court in the remaining circuits that has addressed the question whether IRAs can be exempt under Section 522(d)(10)(E) or a similar state exemption[5] has joined the majority position in recognizing an exemption for IRAs.[6]

[5] In states like Arkansas that do not opt out of the federal bankruptcy exemption scheme, courts apply 11 U.S.C. 522(d)(10)(E) directly. In states that have chosen to opt out of the federal scheme under 11 U.S.C. 522(b)(1), a debtor may assert exemptions set out in state law and in federal non-bankruptcy laws. See *id.* § 522(b)(2). In these states, the question presented in this case will arise when – as is frequently the case – the state exemption law either incorporates or parallels the federal provision; in such cases, courts have treated the interpretation of such state statutes as being inextricably intertwined with the interpretation of Section 522(d)(10)(E). See, *e.g.*, Pet. App. 6a (following the Eighth Circuit's decision in *Huebner*, 986 F.2d 1222, which interpreted an Iowa statute); *McKown*, 203 F.3d at 1189 (interpreting the California statute by following federal precedent because with respect to the IRA exemption issue, "this California

By contrast, the Eighth Circuit holds that IRAs are categorically excluded from exemption.[7] See Pet. App. 6a.

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exemption is materially identical to the federal exemption"); *Dubroff*, 119 F.3d at 78 (interpreting the New York statute by following federal precedent because the two statutes were "similar in all respects").

[6] In the First Circuit, see, *e.g.*, *In re Marsella*, 188 B.R. 731, 732 (Bankr. D.R.I. 1995) (adopting majority position on Section 522(d)(10)(E)); *In re Yee*, 147 B.R. 624, 625-26 (Bankr. D. Mass. 1992) (same); and *In re Bates*, 176 B.R. 104, 109 (Bankr. D. Me. 1994) (adopting majority position on Section 522(d)(10)(E) in applying similar state statute). In the Fourth Circuit, see, *e.g.*, *In re Outen*, 220 B.R. 26, 27-31 (Bankr. D.S.C. 1998) (en banc bankruptcy court) (reversing the court's previous adherence to the Third Circuit rule and adopting the majority position for a state statute "nearly identical" to Section 522(d)(10)(E)). In the Seventh Circuit, see, *e.g.*, *Am. Honda Fin. Corp.* v. *Cilek (In re Cilek)*, 115 B.R. 974, 987-89 (Bankr. W.D. Wis. 1990) (adopting majority position on Section 522(d)(10)(E)). In the Tenth Circuit see, *e.g.*, *In re Garrison*, 108 B.R. 760, 768 (Bankr. N.D. Okla. 1989) (explaining that state exemption law which did not cover IRAs could be amended to include IRAs "by enacting a statute somewhat like present 11 U.S.C. § 522(d)(10)(E)"). In the Eleventh Circuit, see, *e.g.*, *In re Suarez*, 127 B.R. 73, 81 (Bankr. S.D. Fla. 1991) (adopting majority position on Section 522(d)(10)(E) and related state statutes); and *Dionne* v. *Harless (In re Harless)*, 187 B.R. 719, 728 (Bankr. N.D. Ala. 1995) (noting that Section 522(d)(10)(E) "exempts payments under IRAs from the bankruptcy process"). In the D.C. Circuit, see *In re Burkette*, 279 B.R. 388, 393 (Bankr. D.D.C. 2002) (adopting the majority position on Section 522(d)(10)(E), without directly addressing whether the tax penalty for early withdrawal of IRAs satisfies the "on account of * * * age" provision).

[7] The Eighth Circuit has suggested that it might apply a different rule to an IRA that included a provision absolutely barring any withdrawal prior to the age-triggered commencement of payments. See Pet. App. 6a. Yet, so far as petitioners have been able to discern, such IRAs do not exist; it appears that *all* IRAs allow early withdrawal subject to a tax penalty. See Internal

The court of appeals concluded that IRAs permitting tax-penalized withdrawal at any time as specified in the Internal Revenue Code, see 26 U.S.C. 72(t)(1), do not dispense payments "on account of illness, disability, death, age, or length of service." Pet. App. 6a.

Finally, the Third Circuit applies yet another rule. That court excludes "future payments" from IRAs from exemption but permits exemptions for "present payments" – that is, payments received by persons who have already reached the statutory age (59½) that entitles them to withdraw funds from their IRAs. Thus, in the Third Circuit, debtors under age 59½ lose their IRAs, while those aged 59½ and older may keep them to the extent reasonably necessary for financial support. See, *e.g.*, *Clark* v. *O'Neill (In re Clark)*, 711 F.2d 21, 23 (CA3 1983); see also *Velis* v. *Kardanis*, 949 F.2d 78 (CA3 1991) (noting that "as a present entitlement," the debtor's IRA was "susceptible to possible exemption under § 522(d)(10)(E)"). In *Clark*, the court considered whether payments from a different kind of retirement savings plan – a Keogh account – were exempt. That court reasoned that an exemption for "present" but not "future" payments was appropriate because Congress's concern with giving debtors a "fresh start" did not extend to their "long-term security." 711 F.2d at 23. Since then, the Third Circuit's bankruptcy courts

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Revenue Serv., *Publication 590 (2003), Individual Retirement Arrangements (IRAs)*, ch. 1, *available at* http://www.irs.gov/publications/p590/index.html ("You *can withdraw or use your traditional IRA assets at any time*. However, a 10% additional tax generally applies if you withdraw or use IRA assets before you are age 59½." (emphasis added)). See also *Carmichael*, 100 F.3d at 379 (noting that penalized withdrawal is "statutorily applicable to *any* IRA") (emphasis in original). In any event, even if the Eighth Circuit's assumption that some IRAs do not allow withdrawal is in fact correct, such plans are clearly a rare exception to the rule, and the theory that Congress intended to limit the IRA exemption to this very narrow category finds no support either in the statutory text or in the legislative history. See *infra* at 15-17.

have consistently applied this holding to IRAs, on the ground that the statutory language at issue in *Clark* was virtually indistinguishable. See, *e.g.*, *In re Scholl*, No. 97-32805WS, 1998 Bankr. LEXIS 1059, at *9 (Bankr. E.D. Pa. Aug. 26, 1998) (holding, citing *Clark*, that the "controlling case law in this circuit * * * does not permit an IRA to be exempted * * * when the debtor is not currently receiving income therefrom"); *In re Velis*, 123 B.R. 497, 510 (D.N.J.) (citing *Clark* in applying to both Keogh plans and IRAs the rule that "a § 522(d)(10)(E) exemption is applicable only where a debtor has a present, as opposed to a future, right to receive the pension and retirement benefits at issue"), *aff'd in part, rev'd in part*, *Velis* v. *Kardanis*, 949 F.2d 78 (CA3 1991).

2. This three-way circuit split will not resolve itself without this Court's intervention. The Eighth Circuit has refused to reconsider its adherence to its unique position. Although the panel had acknowledged the circuit split and admitted that the contrary view of the Second, Fifth, Sixth, and Ninth Circuits "may be more consistent with the purposes of § 522," Pet. App. 6a, the Eighth Circuit nevertheless denied rehearing en banc by a five-to-four vote, *id.* at 36a.

The Third Circuit's view is similarly entrenched. That court has held its position for twenty-one years, even in the face of sharp criticism from its own bankruptcy courts. See, *e.g.*, *In re Gralka*, 204 B.R. 184, 189 (Bankr. W.D. Pa. 1997) ("Unfortunately for the debtors, they do not presently possess the right to receive payment from their IRAs * * * pursuant to existing Third Circuit precedent."); *In re Snyder*, 206 B.R. 347, 350 (Bankr. M.D. Pa. 1996) ("While I find that * * * the Debtors have a 'right to payment' in the IRA which falls squarely within the provisions of 11 U.S.C. 522(d)(10)(E), * * * I am stifled in that pursuit by a clear and unambiguous decision of the Third Circuit.").

The Third and Eighth Circuits have become intractable outliers; every other court in the other ten circuits that has

considered the question has taken a contrary position.[8] In each of these jurisdictions, the question whether IRA funds are exempt to the extent reasonably necessary is settled. Because the circuit split is now entrenched, this Court's intervention is required.

3. This case provides an ideal vehicle to resolve the three-way circuit split. Both the distinction drawn by the Eighth Circuit and that drawn by the Third are outcome determinative here. In the Eighth Circuit, whether payments from an IRA are exempt turns on whether the IRA's holder has access to the account prior to reaching the age at which he or she becomes statutorily entitled to payments. Since petitioners' IRAs allow tax-penalized early withdrawal, this distinction was outcome determinative in petitioners' case. In the Third Circuit, the key distinction is between "present" payments – those to which the IRA holder is already entitled by virtue of being over the age of 59½ – and "future" payments; only the former are exempt. Although different from the Eighth Circuit rule, the Third Circuit rule would produce the same result in this case – petitioners, both under age 59½ when the exemption was requested, would lose in either circuit.[9]

Furthermore, there are unlikely to be many cases that proceed through the appellate process and present this Court with a vehicle with which to resolve the question presented. Most debtors, already in financial straits, will lack the means to pursue the issue to this point, including seeking rehearing

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[8] See *supra* note 6 (listing cases).

[9] Although petitioner Richard Rousey is now 60 years old, petitioner Betty Jo Rousey is now 57 years old. See Petitioners' C.A. App. 54, 66 (listing ages). Thus, even if their *present* ages rather than their ages at the time they filed their bankruptcy petition were dispositive, this Court would still have to pass on the validity of the Third Circuit's rule in order to determine whether Mrs. Rousey's IRA is exempt.

en banc, particularly in the face of well-established circuit precedent.

II. The Circuit Conflict Is Untenable Given the Importance of the Question Presented.

The conflict over whether and to what extent IRAs are exempt from bankruptcy estates merits this Court's attention in light of the question's importance. Tens or even hundreds of thousands of people every year are likely affected by the resolution of this issue. In 2003 alone, over 1.1 million Chapter 7 individual bankruptcy petitions were filed in the United States. Admin. Office of the U.S. Courts, *News Release: Bankruptcy Filings Up for Calendar Year*, Feb. 25, 2004, *available at* http://www.uscourts.gov/Press_Releases/pr02252004.pdf. IRAs are increasingly ubiquitous: 33.3% of American households hold a traditional IRA, and 7.5% hold an employer-sponsored IRA. See Investment Co. Inst., *Fundamentals: Investment Company Institute Research in Brief* fig. 1 (2003), *available at* http://www.ici.org/shareholders/ret/fm-v12n3.pdf. As far as petitioners are aware, all of these IRAs allow tax-penalized early withdrawal, see *supra* note 8, and are therefore nonexempt under the Eighth Circuit's rule. Additionally, since the median age of IRA holders is 52 for traditional individual IRAs and 46 for employer-sponsored IRAs, see Investment Co. Inst., *supra*, at fig. 2, the expected payments from most IRAs would be considered "future payments" and thus nonexempt under the Third Circuit rule as well.

Not only does the issue affect a great number of people, but the effect on each individual is substantial. An IRA typically represents an enormous investment in one's future: owners of traditional IRAs have set aside a median amount of $30,000 in their accounts. Investment Co. Inst., *supra*, at fig. 2. Since other forms of retirement savings, like pension plans, are available only through employers, IRAs represent one of the very few methods of retirement savings open to

self-employed individuals or small-business employees.[10] Thus, a person may be left without most or all of his or her retirement savings based on the double misfortune of going through bankruptcy and living in a circuit that interprets the federal statute to deny an exemption for IRAs. In the Eighth Circuit, this serious deprivation will occur as a result of a precedent that the panel decision in this case recognized as likely contrary to the purpose of the statute. See Pet. App. 6a. In the Third Circuit, the deprivation will occur as a result of a precedent with no basis in the text of the statute and so erroneous a rationale that courts in the circuit bemoan it. See, *e.g.*, *In re Snyder*, 206 B.R. 347, 350 (Bankr. M.D. Pa. 1996).

It is not surprising that, in light of the foregoing, "whether an individual retirement account ('IRA') qualifies for the section 522(d)(10)(E) exemption has been frequently litigated." Bankr. Exemption Manual § 5.11 (2003 ed.); see also Andrew M. Campbell, Annotation, *Individual Retirement Accounts as Exempt Property in Bankruptcy*, 133 A.L.R. Fed. 1, § 2(a) (1996) ("[T]here has been considerable litigation concerning the application of § 522(d)(10)(E) and state exemption statutes modeled upon it to IRAs."). The exemptions listed in Section 522(d)(10)(E) are relevant to litigation in the bankruptcy courts in most states,[11] many all

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[10] In some cases, as here, the IRA funds were formerly part of a pension plan or 401(k). Pension funds are explicitly exempted from the bankruptcy estate by Section 522(d)(10)(E), but when a worker with a pension or 401(k) plan leaves his job, he may (depending on the plan's rules) be required to "roll" the plan's funds into an IRA if he wishes to maintain a retirement savings account. The Eighth Circuit's rule illogically treats those same funds as non-exempt based solely on the fortuity that they are held in one form rather than another.

[11] See *supra* note 5 (explaining that some states use the federal exemptions directly and many others use Section 522(d)(10)(E) indirectly by incorporating or paralleling its language).

of which have published opinions on the issue.[12] The frequency with which the question presented has been litigated is testimony to the great number of people affected and the significance of the effect, and thus the need for this Court to definitively resolve the issue.

Beyond the fact that similarly situated debtors are treated differently across circuits, the longstanding circuit split causes additional unfairness and uncertainty. For example, individuals who, like petitioners, find themselves forced to roll over a pension plan or 401(k) into an IRA at the termination of their employment will suddenly find their retirement funds no longer eligible for bankruptcy exemption. Individuals who put money into an IRA while living in jurisdictions that allow for the exemption, expecting the funds to be protected if they ever have to file for bankruptcy, will have their expectations frustrated if they subsequently move to a jurisdiction that denies the exemption and later file for bankruptcy there. And individuals aware of the conflict among the circuits may be wary of investing in an IRA at all because of the possibility of moving into a jurisdiction that denies the exemption. This uncertainty frustrates Congress's purpose in enabling the creation of IRAs: to encourage retirement savings. Only this Court can bring proper and final resolution to this important and heavily litigated issue.

III. Individual Retirement Accounts Are Eligible for Bankruptcy Exemption Under Section 522(d)(10)(E).

Certiorari is also warranted because the decision below is wrong on the merits. IRAs fall squarely within the exemption defined by Section 522(d)(10)(E). A straightforward application of the statute reveals that, as a matter of law, an IRA confers "the right to receive * * * a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or

[12] See *supra* note 6 (listing cases).

contract on account of illness, disability, death, age, or length of service."

The statute's text and structure make clear that IRAs are included within the exemption that Section 522(d)(10)(E) defines. Specifically, after identifying a group of plans and contracts that qualify for exemption, Section 522(d)(10)(E)(iii) then *denies* exemptions to certain plans and contracts that do *not* "qualify under section * * * 408 of the Internal Revenue Code." Section 408 is the provision that defines IRAs. See 26 U.S.C. 408(a), (c). Under settled principles of statutory construction, Section 522(d)(10)(E) must include at least some plans defined under Section 408; the explicit exclusion of plans that do not fall within Section 408 from the exemption would otherwise constitute mere surplusage. As the Ninth Circuit pointed out in *Farrar v. McKown*, 203 F.3d 1188, 1190 (CA9 2000), "[t]here could be no reason for legislators to exclude *non-qualifying* IRAs from the exemption, as the exception does, unless they intended that *qualifying* IRAs could be exempt. Indeed, there could be no reason even to mention Section 408, the IRA section, unless 'similar plan or contract' included them" (emphases added). Accord *Carmichael v. Osherow*, 100 F.3d 375, 378 (CA5 1996); *Dettmann v. Brucher*, 243 F.3d 242, 243 (CA6 2001); *Dubroff v. First Nat'l Bank of Glens Falls*, 119 F.3d 75, 77-78 (CA2 1997).

Despite the statute's specific inclusion of IRAs, the Third and Eighth Circuits nevertheless have drawn erroneous distinctions to exclude IRAs from exemption. Contrary to the Third Circuit's suggestion in *Clark*, *see* 711 F.2d at 23, the language of Section 522(d)(10)(E) does not distinguish between "present payments" and "future payments," nor does anything in the provision's text, structure, or legislative history suggest that Congress intended to draw any time- or age-based distinctions. "The language of the section does not include words like 'presently,' 'currently,' or 'immediately,'" *Carmichael*, 100 F.3d at 379, nor does it include any other indication of intent to exclude future payments. Indeed, such

an exclusion would be at odds with the statute's express inclusion of pension plans, profitsharing plans, and annuities, all of which involve an entitlement to future payments. The provision's legislative history explicitly states that "paragraph (10) exempts certain benefits that are akin to *future* earnings of the debtor." H.R. Rep. 95-595, at 362 (1977) (emphasis added). Like the other plans listed in the statute, "IRAs too are substitutes for future earnings." *Carmichael*, 100 F.3d at 378.

It is similarly unsupportable for the Eighth Circuit to exclude IRAs from exemption simply because holders may make early withdrawals subject to a tax penalty. Pet. App. 6a. The "right to receive payments" from an IRA is unquestionably triggered by four events – "age 59½," "death," "being disabled," or "medical care," see 26 U.S.C. 72(t)(2)(A)(i)-(iii) ; *id.* § 72(t)(2)(B)[13] – that precisely parallel four of the five alternative conditions for exemption set out in Section 522(d)(10)(E): "illness, disability, death, age, or length of service." Tax-penalized early withdrawal cannot be a basis for concluding that a plan does not qualify for exemption. Such withdrawal is not only a feature of all IRAs, but also of all the other instruments listed in the statute: stock bonuses, pensions, profitsharing plans, and annuities. See 26 U.S.C. 72(t) (permitting early withdrawal for "qualified retirement plans," which 26 U.S.C. 4974(c) defines to include all of the above-listed plans). The Eighth Circuit opinion is silent regarding whether its holding – requiring that a plan specifically bar early withdrawal in order to qualify for exemption – applies to these other types of plans as well as to

[13] Petitioners have a right to receive payments without penalty starting at the age of 59½, and are *required* to accept payments when they reach the age of 70½. See, *e.g.*, Petitioners' C.A. App. 58 ¶¶ 7, 10(A) (setting forth plan rules). Both of these features of petitioners' IRAs are statutory. See 26 U.S.C. 72(t) (penalizing withdrawal before age 59½); *id.* § 408(a)(6) (requiring payments after age 70½, as explained in 26 C.F.R. 1.408-8).

IRAs, but either way its reasoning is unjustified. Either the Eighth Circuit holds IRAs nonexemptible on the basis of a statutory feature they share in common with exemptible plans, or it holds that *no plan of any type* qualifies for exemption unless it contains an unheard-of provision barring early withdrawal. The first possibility is patently illogical, and the second creates an unprecedented rule so restrictive that it would effectively eviscerate the entire exemption. Cf. *Carmichael*, 100 F.3d at 379 (stating that "[n]o philosophical or economic distinction that would preclude an IRA's exemptibility can be drawn between relevant features of profitsharing plans and similar features of IRAs" and that profitsharing and other listed plans are "per se exemptible").

Because it conflicts with both the plain language and the intent of Section 522(d)(10)(E), the decision of the Eighth Circuit in this case should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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April 6, 2004[14]

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-3505

IN RE: RICHARD GERALD ROUSEY; IN RE: BETTY JO ROUSEY,
DEBTORS.

RICHARD GERALD ROUSEY; BETTY JO ROUSEY, APPELLANTS,

v.

JILL R. JACOWAY, APPELLEE.

Submitted: March 10, 2003
Filed: Oct. 20, 2003

Appeal from the United States Bankruptcy Appellate Panel
for the Eighth Circuit

Before HANSEN, Chief Judge,[1] RILEY and MELLOY, Circuit Judges.

Opinion by Judge HANSEN.

OPINION

HANSEN, Circuit Judge.

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[1] The author of the opinion stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on March 31, 2003. He has been succeeded by the Honorable James B. Loken.

Debtors Richard Gerald Rousey and Betty Jo Rousey appeal a judgment of the Eighth Circuit Bankruptcy Appellate Panel[2] affirming an order of the bankruptcy court[3] that disallowed claimed exemptions in two Individual Retirement Accounts (IRAs). The sole issue on appeal is whether the debtors' IRAs are exempt from the bankruptcy estate pursuant to 11 U.S.C. § 522(d)(10)(E). Following the precedent in this circuit, we hold that the funds are not exempt, and we affirm.

I.

The debtors filed a voluntary petition for relief under Chapter 7 of the bankruptcy code. Included in their assets were two IRAs valued at $42,915.32 and $12,118.16. Both debtors established these IRAs in the form of deposit accounts from funds rolled over from their previous employer's pension plans approximately two years before filing their bankruptcy petition. Neither debtor has deposited further funds into the IRAs since the initial deposits, and both debtors have the ability to withdraw funds from their accounts at any time subject only to early withdrawal tax penalties. The debtors claimed exemptions for $5,033 and $5,648--$10,681 in total--of these IRAs pursuant to 11 U.S.C. § 522(d)(5), and exemptions for the remaining amounts, $37,882.32 and $6,470.16--$44,352.48 in total--under 11 U.S.C. § 522(d)(10)(E). The bankruptcy trustee filed an objection to the § 522(d)(10)(E) exemptions but did not object to the debtors' § 522(d)(5) exemptions. Applying Eighth Circuit precedent, the bankruptcy court found that the IRAs were not

[2] The Honorable Robert J. Kressel, United States Bankruptcy Judge for the District of Minnesota, authored the opinion for a panel that included the Honorable Arthur B. Federman, Chief Judge, United States Bankruptcy Court for the Western District of Missouri, and the Honorable Barry S. Schermer, United States Bankruptcy Judge for the Eastern District of Missouri, concurring.

[3] The Honorable Robert F. Fussell, United States Bankruptcy Judge for the Eastern and Western Districts of Arkansas.

exempt under 11 U.S.C. § 522(d)(10)(E), and the Bankruptcy Appellate Panel affirmed. The debtors appeal.

II.

A debtor in bankruptcy may claim an exemption pursuant to 11 U.S.C. § 522(d)(10)(E) for:

> a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose; (ii) such payment is on account of age or length of service; and (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

11 U.S.C. § 522(d)(10)(E) (2000). Pursuant to this section, payments from the debtors' IRAs are exempt only if (1) the IRAs are a "pension, annuity, or similar plan or contract;" (2) the payments are made "on account of illness, disability, death, age, or length of service;" and (3) the payments are reasonably necessary for the debtors' support or the support of their dependents. Because neither the bankruptcy court nor the Bankruptcy Appellate Panel reached the issue of whether the payments are reasonably necessary for the debtors' support, we address only the first two statutory requirements.

A.

The bankruptcy courts relied on our decision in *Eilbert v. Pelican (In re Eilbert)*, 162 F.3d 523 (8th Cir.1998), in concluding that the IRAs at issue in this case are not "similar

plans or contracts." In construing an Iowa statutory exemption "nearly identical" to § 522, the *Eilbert* court held that a single premium Individual Retirement Annuity contract (not a deposit account) that was purchased with nonexempt, inherited assets as a prebankruptcy planning measure by a prospective debtor who had already reached retirement age was not a "pension, annuity, or similar plan or contract." *See* 162 F.3d at 526-27. The court reasoned that single premium annuity investments are not "akin to future earnings" within the meaning of the Iowa statute nearly identical to § 522 because the payments did not replace lost income and were not established as part of a long-term retirement strategy. *Id.*

The debtors assert that *Eilbert* is inapposite because the Iowa statute did not contain the internal reference to 26 U.S.C. § 408, dealing exclusively with Individual Retirement Accounts and Individual Retirement Annuities, that appears in § 522(d)(10)(E)(iii). Adopting the reasoning of four of our sister circuits, the debtors argue that the reference to § 408 in the exceptions to exemption suggests that "at least some--if not all--IRAs were intended to be included in the phrase 'similar plan or contract.' "*Carmichael v. Osherow (In re Carmichael)*, 100 F.3d 375, 378 (5th Cir.1996); *see also Dettmann v. Brucher (In re Brucher)*, 243 F.3d 242, 243 (6th Cir.2001) (quoting *Carmichael*); *Farrar v. McKown (In re McKown)*, 203 F.3d 1188, 1190 (9th Cir.2000) ("There could be no reason for legislators to exclude non-qualifying IRAs from the exemption, as the exception does, unless they intended that qualifying IRAs could be exempt. Indeed, there could be no reason even to mention section 408, the IRA section, unless 'similar plan or contract' included them."); *Dubroff v. First Nat'l Bank of Glens Falls (In re Dubroff)*, 119 F.3d 75, 78 (2d Cir.1997) ("[I]f the statute excludes IRAs from exemption because they are not 'similar plans or contracts,' there would be no need for the reference to § 408 of the I.R.C., the statute governing IRAs, in [the state statute] and that reference would be surplusage."). The debtors also note that *Patterson v. Shumate*, 504 U.S. 753 (1992), offers

further support for this conclusion. In distinguishing between funds excluded from the bankruptcy estate pursuant to § 541(c)(2) and those that are included in the estate but otherwise qualify for exemption, the Supreme Court suggested in dicta that plans qualified under § 408 may be exempt under § 522(d)(10)(E). *See Patterson*, 504 U.S. at 762-63 (responding to the trustee's argument that a certain construction of § 541(c)(2) rendered § 522(d)(10)(E) surplusage by demonstrating that some plans not excludable still may be exemptible).

We agree with the debtors that the facts and law in *Eilbert* are distinguishable. Unlike Mrs. Eilbert, the Rouseys did not establish their IRAs as a prebankruptcy planning matter, but rather opened them with funds rolled over from a pension plan that had been established over time as part of a long-term retirement strategy and to which contributions had been made. We agree that where an individual retirement account serves as a substitute for future earnings, Congress would probably consider it a "similar plan or contract" as those explicitly listed in § 522(d)(10)(E). *See Carmichael*, 100 F.3d at 378 ("[T]o hold otherwise would be to create a trap for the unwary in those frequent instances in which funds from other exempt plans are 'rolled over' into IRAs when those other plans terminate or when employment ceases.").[4] Furthermore, to the extent that our sister circuits have relied upon § 522's internal reference to § 408, we agree that the federal statute is materially different from the Iowa statute at issue in *Eilbert* and that Congress probably intended some IRAs to be included as "similar plans or contracts." The dicta from the Supreme Court's opinion in *Patterson* supports this conclusion. However, if Congress had intended all IRAs which qualify under § 408 to be exemptible as a "similar plan

[4] Indeed, after our decision in *Eilbert*, the Iowa General Assembly amended its statute to explicitly exempt rollovers into § 408 IRAs. *See* Iowa Code § 627.6(8)(f)(2) (2003) (amended in 2001).

or contract," it would have been a very easy legislative task to have affirmatively accomplished.

B.

However, even if these debtors' individual retirement accounts qualify as "similar plans or contracts," in order to be eligible for exemption the payments made from them must be triggered by "illness, disability, death, age, or length of service." Our court in *Huebner v. Farmers State Bank*, 986 F.2d 1222 (8th Cir.) (applying the nearly identical Iowa statute), *cert. denied*, 510 U.S. 900 (1993), held that future payments from the corpus of an Individual Retirement Annuity are not "on account of age" where debtors have unfettered discretion to withdraw from the corpus at any time subject only to modest early withdrawal tax penalties. *See* 986 F.2d at 1225. Because the debtors here admit to having unlimited access to the funds in their IRAs, we find that *Huebner* directly controls and that these debtors' account withdrawals are not required to be made "on account of illness, disability, death, age, or length of service." We recognize that four of our sister circuits have reached a contrary result that may be more consistent with the purposes of § 522 and with their resolution of the "similar plan or contract" issue. We are constrained, however, by our precedent, and by our conclusion that these accounts are readily accessible savings accounts of which the debtors may easily avail themselves (albeit with some discouraging tax consequences) at any time for any purpose.

III.

Faithful application of our circuit's binding precedent requires us to hold that the debtors' IRAs do not qualify for exemption under § 522(d)(10)(E). Accordingly, the judgment of the Bankruptcy Appellate Panel is affirmed.

APPENDIX B

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE EIGHTH CIRCUIT

No. 02-6013WA.

IN RE RICHARD G. ROUSEY AND BETTY JO ROUSEY, DEBTORS.

RICHARD G. ROUSEY AND BETTY JO ROUSEY, APPELLANTS,

v.

JILL R. JACOWAY, APPELLEE.

Submitted: August 30, 2002
Filed: September 13, 2002

Appeal from the United States Bankruptcy Court for the Western District of Arkansas

Before KRESSEL, SCHERMER and FEDERMAN, Bankruptcy Judges.

KRESSEL, Bankruptcy Judge.

Richard and Betty Jo Rousey appeal from the bankruptcy court[1] order denying exemption of portions of

[1] The Honorable Robert F. Fussell, United States Bankruptcy Judge for the Eastern and Western Districts of Arkansas.

their Individual Retirement Accounts under 11 U.S.C. § 522(d)(10)(E). Because we think the bankruptcy court correctly applied Eighth Circuit precedents, we affirm.

BACKGROUND

The material facts are not in dispute. The debtors, Richard and Betty Jo Rousey, filed a voluntary joint Chapter 7 petition on April 27, 2001, appellee Jill R. Jacoway was appointed to serve as trustee in their case. The debtors elected to use the bankruptcy exemptions provided by 11 U.S.C. § 522(b)(1)[2] and found in 11 U.S.C. § 522(d). Listed on the debtors' Schedule B were their ownership interests in two IRAs. Both debtors established their IRAs in the form of deposit accounts at the First National Bank of Berryville, Arkansas[3] from funds rolled over from their Northrop Grumman[4] Plans. Neither debtor, however, has deposited any further money into their IRA since the initial deposits that established their accounts. Both debtors have the unfettered ability to withdraw funds from their accounts.

The IRA owned by Richard Rousey totaled $42,915.32 at the time of bankruptcy filing. Mrs. Rousey's IRA totaled $12,118.16 at the time of filing. Their Schedule C claimed $5,033.00 of Richard Rousey's IRA exempt under 11 U.S.C. § 522(d)(5)[5], and the remainder of $37,882.32 under 11 U.S.C. § 522(d)(10)(E). Betty Jo Rousey claimed as exempt $5,648.00 of her IRA under 11 U.S.C. § 522(d)(5) and the remainder of $6,470.16 under 11 U.S.C. § (d)(10)(E).

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[2] 11 U.S.C. § 522(b) permits a debtor to choose between the bankruptcy exemptions provided in § 522(d) and the exemptions under state law, unless a state "vetoes" the debtor's option to choose the bankruptcy exemptions. *Huebner v. Farmers State Bank, Grafton, Iowa (In re Huebner)*, 986 F.2d 1222, 1224 (8th Cir.1993).

[3] Mr. Rousey established his IRA account in March of 1999. Mrs. Rousey established her IRA account in April of 1999.

[4] Northrop Grumman is the debtors' former employer.

[5] 11 U.S.C. § 522(d)(5) allows the exemption of "any property" subject to the monetary limitations set out.

On August 3, 2001, the trustee filed an objection to the exemption claims and argued that the Rouseys are not entitled to claim exemptions of the IRAs pursuant to 11 U.S.C. § 522(d)(10)(E) in the total amount of $44,352.48. She asked that the non-exempt portions be turned over to her. The trustee does not object to the debtors' claimed exemption in the total amount of $10,681.00 pursuant to 11 U.S.C. § 522(d)(5). On February 13, 2002, the bankruptcy court entered its order sustaining the trustee's objection and granting her motion. The court determined that the IRAs did not qualify as "similar plans or contracts" under 11 U.S.C. § 522(d)(10)(E) because the debtors had unfettered discretion to withdraw from the corpus. The court also determined that payments under the plans were not on account of illness, disability, death, age or length of service as required under that section. The debtors filed a timely appeal.

DISCUSSION

Standard of Review

"We review a bankruptcy court's conclusions of law de novo and its factual findings under the clearly erroneous standard." *Merchants Nat'l Bank of Winona v. Moen (In re Moen)*, 238 B.R. 785, 790 (8th Cir. BAP 1999) (quoting *Sinclair Oil Co. v. Jones (In re Jones)*, 31 F.3d 659, 661 (8th Cir.1994)).

EXEMPTION UNDER 522(D)(10)(E)

Similar Plan or Contract

11 U.S.C. § 522(d)(10)(E) provides an exemption for:

> a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death,

> age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose; (ii) such payment is on account of age or length of service; and (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

11 U.S.C. § 522(d)(10)(E). There are essentially three main requirements that a debtor must meet to properly claim as exempt payments from an investment plan/income stream: payments are exempt only if they (1) are received pursuant to a pension, annuity, or similar plan or contract; (2) are on account of illness, disability, death, age, or length of service; (3) are reasonably necessary for the debtor's support or for the support of a dependent of the debtor. *Andersen v. Ries (In re Andersen)*, 259 B.R. 687, 691 (8th Cir. BAP 2001). To help define what encompasses the generic phrase "similar plan or contract" the court in *Eilbert v. Pelican*[6] used the interpretive canons *noscitur a sociis* (a term is known from its associates) and *ejusdem generis* (general words in an enumeration are construed as similar to more specific words in the

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[6] The Eighth Circuit B.A.P. in *Eilbert v. Pelican*, was interpreting Iowa Code § 627.6(8)(e). This section provided an exemption for a debtor's interest in a "payment or portion of a payment under a pension, annuity, or similar plan or contract on account of illness, disability, death, age or length of service." The Iowa Code section is very similar to the text in 11 U.S.C. § 522(d)(10)(E), and the Court's analysis of the Iowa Code section is useful in helping to interpret the similar text within § 522(d)(10)(E). Although the Iowa statute has now been changed, the analysis of its former language remains apropos.

enumeration). *Eilbert v. Pelican (In re Eilbert)*, 162 F.3d 523, 527 (8th Cir.1998). These canons are employed "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Id.* at 527 (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)).The court in *Eilbert* used the specific term "pension" as a touchstone to help define the general term "annuity" and the phrase "similar plan or contract." As required by the Eighth Circuit we apply those interpretive canons here.

A pension is a retirement benefit paid regularly based on length of employment and amount of wages or salary, in other words, deferred compensation for services rendered. *Id.*; Blacks Law Dictionary 1134 (6th ed.1990). Since the word pension is the more specific word, it restricts the meaning of "similar plan or contract" under 11 U.S.C. § 522(d)(10)(E). *Id.* This catchall provision includes within the exemption other types of retirement plans or investments that are "created to fill or supplement a wage or salary void." *Id.*; (quoting *Matter of Pettit*, 55 B.R. 394, 397-98 (Bankr.S.D.Iowa)), *aff'd*, 57 B.R. 362 (S.D.Iowa 1985). Congress described the federal exemption as exempting "certain benefits that are akin to future earnings of the debtor." H.R.Rep. 95-595, at 362 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6318. Thus, the purpose of exempting the right to payments under a pension, annuity, or similar plan is to protect payments which function as wage substitutes after retirement. *Eilbert*, 162 F.3d at 526-527. Under Eighth Circuit Court of Appeals precedent, the debtors' IRAs do not come within the purpose of the exemption provision and do not meet the definition of similar plan or contract because the payments from their IRA are not "similar" to pensions.

We have listed a number of factors to help courts analyze this issue. First, in both *Andersen* and *Eilbert*, we stated that contributions made to an investment over time, rather than one lump sum, would make it more likely that the investment falls within the ambit of the statute. *Andersen v. Ries (In re Andersen)*, 259 B.R. 687, 691 (8th Cir. BAP

2001); *Eilbert v. Pelican*, 212 B.R. 954, 958-959 (8th Cir. BAP 1997). Neither Richard Rousey nor his wife Betty contributed any money to the IRA accounts other than the initial lump sum contribution that established their accounts.

Second, in *Andersen* and *Eilbert* we held that contributions made by multiple contributors, rather than investments purchased in isolation and outside the context of workplace contributions, are more likely to qualify as exempt under 11 U.S.C. § 522(d)(10)(E). *Andersen*, 259 B.R. at 691; *Eilbert*, 212 B.R. at 959. Although the money deposited in the debtors' IRA accounts were initially traceable to funds rolled over from a plan established with their former employer Northrop Grumman, once the debtors' employment terminated, all funds received from the Northrop Grumman plan became the property of the debtors who were free to dispose of such funds in whatever way they chose. The debtors, instead of using the funds to buy a car or take a vacation, decided to deposit the money into an IRA that gave them unfettered discretion to the corpus. At the time they made the lump sum contribution to establish their IRAs, they were the only contributors because the funds deposited were solely their own. Thus, there were no multiple contributors to the debtors' IRAs. Moreover, their accounts were established outside the context of workplace contributions.

Third, in *Andersen* and *Eilbert* we looked at the return on investment. An investment that returns only the initial contribution of the debtor with earned interest or income, no more and no less, is more than likely not an exempt investment. Yet those investments that compute payments based on the participant's life span and terminate upon his death are more likely to be exempt under 11 U.S.C. § 522(d)(10)(E). *Andersen*, 259 B.R. at 691; *Eilbert*, 212 B.R. at 959. The only return on investment the debtors would likely receive are portions of the initial payment they made to establish their IRAs and any interest that may have accrued on that payment.

Finally, in *Andersen* and *Eilbert* we examined the amount of control the debtor exercises over the claimed asset. If the terms of the investment impose limitations[7] on the debtor's right to withdrawal, then it is more likely that the investment comes within the ambit of the statute. Yet if the debtor, at his discretion, is able to access the funds of his investment and designate the date of disbursement, subject only to contractual or tax penalties, then such an investment is less likely to be exempt under 11 U.S.C. § 522(d)(10)(E). *Andersen*, 259 B.R. at 691; *Eilbert*, 212 B.R. at 959. Both of the debtors admitted that their ability to access the funds of their IRAs were completely at their discretion and the only "limitation" on that access would be a ten percent tax penalty, which has not been regarded by the Eighth Circuit as a substantial limit to withdrawal. *Eilbert v. Pelican*, 162 F.3d 523, 528 (8th Cir.1998).

Reference to 26 U.S.C. § 408

11 U.S.C. § 522(d)(10)(E)(iii) makes reference to 26 U.S.C. § 408 which is the provision of the Internal Revenue Service Code that deals exclusively with IRAs. The debtors argue that by virtue of this reference their IRAs were intended to be included in the phrase "similar plan or contract" and thus exempt under 11 U.S.C. § 522(d)(10)(E). The debtors cite the case of *Patterson v. Shumate*, 504 U.S. 753 (1992), among others, to support this argument.

The Supreme Court in *Patterson* stated that the "applicable non-bankruptcy law" text of 11 U.S.C. § 541(c)(2) applies to federal and state law. *Id.* at 759. Moreover, the Court stated that ERISA-qualified trusts are excluded from the bankruptcy estate by virtue of ERISA's anti-alienation clause. *Id.* at 760. The Court, however, did not

[7] We have held that the tax and contractual penalties that are triggered when the IRA funds are withdrawn before age fifty nine and a half may not necessarily be regarded as a limit to withdrawal. *Eilbert*, 212 B.R. at 959.

rule on the issue of whether investment plans qualifying for preferential tax treatment under 26 U.S.C. § 408 and established for the purpose of funding retirement income, but not specifically covered by ERISA's anti-alienation clause, would qualify for exemption under 11 U.S.C. § 522(d)(10)(E). What the Court stated in dicta, however, was that such investment plans could be exempted under 11 U.S.C. § 522(d)(10)(E) because that section of the Bankruptcy Code is broader than § 541(c)(2), and applies to more than merely ERISA-qualified plans containing alienation provisions. *Id.* at 762-763. Thus, the Supreme Court's statements in *Patterson* regarding exemption of IRAs is not very helpful to the debtors.

The debtors also cite *Carmichael v. Osherow (In re Carmichael)*, 100 F.3d 375, 378 (5th Cir.1996), and *Dettmann v. Brucher (In re Brucher)*, 243 F.3d 242, 243 (6th Cir.2001), among others,[8] to support their proposition that the internal reference to 26 U.S.C. § 408 in 11 U.S.C. § 522(d)(10)(E) implies that IRAs were intended to be included in the phrase "similar plan or contracts." The Sixth Circuit in *In re Brucher*, quoting the Fifth Circuit in *In re Carmichael*, 100 F.3d at 378, stated:

> § 522(d)(10)(E)(iii) specifically denies exemption to those "similar plans or contracts" that fail to qualify under § 408 of the Internal Revenue Code, a provision dealing exclusively with IRAs. This express Code-section reference to IRAs in the exception makes inescapable the conclusion that at least some--if not all--IRAs were intended to be included in the phrase "similar plan or contract." Were that not so, there would be no exempt § 408 plans or contracts from which non § 408 plans or contracts could be exceptions.

[8] The debtors also cite *In re Dubroff*, 119 F.3d 75 (2nd Cir.1997) and *In re McKown*, 203 F.3d 1188 (9th Cir.2000).

In re Brucher, 243 F.3d at 243. The rule adopted in these cases is often labeled the "Per Se Exemption"[9] and adoption of this rule requires expanding norms of statutory construction that many courts are unwilling to make. *In re Billy R. Skipper*, 274 B.R. 807, 817 (Bankr.W.D.Ark.2002). Courts that have adopted the Per Se Exemption argue that holding otherwise would render the mention of 26 U.S.C. § 408 in subparagraph (d)(10)(E)(iii) of 11 U.S.C. § 522 surplusage. *Id.* Adopting the Per Se Exemption of IRAs, however, would also render the "similar plan or contract" language of § 522(d)(10)(E) surplusage in cases involving IRAs. *Id.*

Contrary to the interpretation given by some courts, there is nothing explicit within the Bankruptcy Code, the legislative history, or 11 U.S.C. § 522(d)(10)(E) itself which manifests Congressional intent to exempt IRA retirement plans in toto. In interpreting 11 U.S.C. § 522(d)(10)(E), we are mindful of the principle that exemption statutes should be construed liberally in favor of the debtor. *Wallerstedt v. Sosne (In re Wallerstedt)*, 930 F.2d 630, 631-632 (8th Cir.1991). The liberal construction of exemption statutes, however, is not a license to circumvent legislative intent. As the Supreme Court in *Connecticut National Bank v. Germain* stated, "a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254 (1992). When a statute's language is plain, the sole function of the courts is to enforce such language according to its terms, not to expand the statute's meaning. *Hartford Underwriters Insurance Company v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *see also United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (stating where the statute's language is plain,

[9] It is hardly a "per se" rule. The opinion explicitly uses the word "some."

"the sole function of the courts is to enforce it according to its terms.") (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). Thus IRA plans would still have to meet the requirements under 11 U.S.C. § 522(d)(10)(E) in order for IRA funds to be exempt under that provision.

The premise of the "per se" rule seems to be that an IRA could never meet the "similar plan or contract" or "payable on account of" tests so somehow those tests must not apply, otherwise the reference to § 408 would have no significance. We think this legal assumption and the statutory analysis are both wrong. The types of IRA investments that the debtors could have chosen is extremely broad. They could have chosen to use it to purchase annuities that limited their access and started payments to them when they reached a certain age. Instead they chose to put it into a bank account, to which they had unlimited access. Secondly, as a matter of statutory construction, 11 U.S.C. § 522(d)(10)(E)(iii) is a *limitation* on the right to claim an exemption. We have trouble elevating a limitation into a new per se exemption.

On Account of Illness, Disability, Death, Age or Length of Service

The bankruptcy court determined that the debtors' right to payment from their IRAs is not on account of illness, disability, death, age or length of service as required by the statute and Eighth Circuit precedents. For example, in *In re Huebner*, the Eighth Circuit Court of Appeals stated that because Huebner had complete access and control over the withdrawal and the timing of his annuity payments, that any payments received were not on account of his age or any other of the triggering events within the statute. *Huebner v. Farmers State Bank, Grafton, Iowa (In re Huebner)*, 986 F.2d 1222, 1225 (8th Cir.1993). Similarly, in *Eilbert v. Pelican*, the Eighth Circuit Court of Appeals stated that because the debtor had unfettered discretion to withdraw the funds from her annuity before age fifty nine and a half, subject only to a

relatively modest ten percent federal tax penalty, the debtor's control over her annuity was not substantially restricted and consequently the payments were not on account of her age. *Eilbert v. Pelican*, 162 F.3d 523, 527-528 (8th Cir.1998). The fact that the debtors in this case have complete discretion over the withdrawal of their IRA funds, subject only to a ten percent tax penalty, shows there is no substantial restriction to withdrawal and that payments of such funds are not on account of any factor listed in 11 U.S.C. § 522(d)(10)(E). The fact that the debtors have unfettered discretion to withdrawal causes their IRAs to look less like exempt retirement plans and more like non-exempt bank savings accounts with favorable tax treatment. *Huebner v. Farmers State Bank, Grafton, Iowa (In re Huebner)*, 986 F.2d at 1225.

The debtors have argued that if we hold that their IRAs are not exempt under 11 U.S.C. § 522(d)(10)(E), we would be adopting a "per se" rule that all IRAs are not exempt under 11 U.S.C. § 522(d)(10)(E). This simply is not the case. As noted earlier not all IRAs are alike. While each case must be decided on its own facts, we do not think that either the bankruptcy court's ruling or our opinion constitutes a decision that an IRA could never be exempt.

CONCLUSION

The bankruptcy court correctly concluded that the debtors' Individual Retirement Accounts are not exempt under 11 U.S.C. § 522(d)(10)(E). The debtors' IRAs are not similar plans or contracts pursuant to the statute, nor are the payments under the IRAs on account of illness, disability, death, age or length of service. The judgment of the bankruptcy court is affirmed.

SCHERMER, Bankruptcy Judge concurring.

I concur in the holding that the debtors' Individual Retirement Accounts are not exempt under 11 U.S.C. §

522(d)(10)(E) based upon precedent of our Circuit. However, I would invite our Circuit to revisit this issue where, as here, the debtors' pensions would have been exempt had they filed their bankruptcy petition while employed by Northrop Grumman, but they are not exempt where the debtors filed after their employment ceased and they rolled over the proceeds of their Northrop Grumman pensions into IRAs. Each Circuit which has examined the issue has held that IRAs may be exempt under Section 522(d)(10)(E). *See In re Brucher*, 243 F.3d 242 (6th Cir.2001); *In re McKown*, 203 F.3d 1188 (9th Cir.2000); *In re Dubroff*, 119 F.3d 75 (2nd Cir.1997); and *In re Carmichael*, 100 F.3d 375 (5th Cir.1996).

APPENDIX C

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF ARKANSAS,
HARRISON DIVISION

No. 3:01-BK-13241

IN RE RICHARD GERALD ROUSEY AND BETTY JO ROUSEY,
DEBTORS.

Feb. 13, 2002.

Order Sustaining Trustee's Objection to Exemptions and Granting Motion for Turnover

ROBERT F. RUSSELL, Bankruptcy Judge.

Pending before the Court is the "Objection to Claim of Exemptions and Motion for Turnover" filed by Jill Jacoway, the chapter 7 trustee (the "Trustee"), on August 3, 2001. The Court conducted an evidentiary hearing on the objection to exemptions and motion for turnover on October 24, 2001. For the reasons stated below, the Trustee's objection to exemptions is sustained and her motion for turnover is granted.

I. *Jurisdiction.*

This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(B) and (E). The following order constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052(a).

II. *Findings of Fact.*

Richard Gerald Rousey and Betty Jo Rousey ("Debtors") filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code on April 27, 2001. Debtors' Schedule B, "Personal Property," lists Debtors' interests in two IRAs at the First National Bank in Berryville, Arkansas, specifically, IRA CERT # 208221 in the name of Richard Gerald Rousey, and IRA CERT # 208345 in the name of Betty Jo Rousey (collectively the "IRAs"). On Debtors' Schedule C, "Property Claimed as Exempt," Debtors claimed the following exemptions of the IRAs:

Description of Property	Specify Law Providing Each Exemption	Value of Claimed Exemption	Current Market Value of Property Without Deducting Exemption
IRA CERT # 208221 First National Bank, Berryville, AR	11 U.S.C. § 522(d)(5)	5,033.00	42,915.32
	11 U.S.C. § 522(d)(10)(E)	37,882.32	
IRA CERT # 208345 First National Bank, Berryville, AR	11 U.S.C. § 522(d)(5)	5,648.00	12,118.16
	11 U.S.C. § 522(d)(10)(E)	6,470.16	

On August 3, 2001, the Trustee filed an objection to exemptions and motion for turnover, and argued that Debtors are not entitled to claim exemptions of the IRAs pursuant to 11 U.S.C. § 522(d)(10)(E) in the total amount of $44,352.48. The Trustee does not object to Debtors' claimed exemptions

in the total amount of $10,681.00 pursuant to 11 U.S.C. § 522(d)(5).

On October 24, 2001, the Court conducted an evidentiary hearing on the Trustee's objection to exemptions and motion for turnover. At the hearing, the parties stipulated to the amounts and account numbers of the IRAs, as set forth above. The Court heard the testimony of Debtors, who each testified that it is their understanding that they can withdraw money from the IRAs at any time, subject to a 10% tax penalty. At the conclusion of the hearing, upon the request of the parties, the Court continued the matter to allow for additional discovery and the introduction of additional evidence as to the extent to which the IRAs are reasonably necessary for the support of Debtors. In addition, the Court informed the parties that it would rule in the interim on the issue of whether Debtors' ability to withdraw money from the IRAs at any time renders 11 U.S.C. § 522(d)(10)(E) inapplicable to this case as a matter of law.

On December 21, 2001, the parties filed a joint stipulation, admitting into evidence copies of the IRA custodial account agreements pertaining to the IRAs. The two account agreements are identical, and, with regard to distribution, provide as follows:

> 1. Notwithstanding any provision of this agreement to the contrary, the distribution of the Depositor's interest in the custodial account shall be made in accordance with the following requirements and shall otherwise comply with section 408(a)(6) and Proposed Regulations section 1.401(a)(9) 2, the provisions of which are incorporated by reference.
> 2. Unless otherwise elected by the time distributions are required to begin to the Depositor under paragraph 3, or to the surviving spouse under paragraph 4, other than

in the case of a life annuity, life expectancies shall be recalculated annually. Such election shall be irrevocable as to the Depositor and the surviving spouse and shall apply to all subsequent years. The life expectancy of a nonspouse beneficiary may not be recalculated.

3. The Depositor's entire interest in the custodial account must be, or begin to be, distributed by the Depositor's required beginning date, (April 1 following the calendar year end in which the Depositor reaches age 70 1/2). By that date, the Depositor may elect, in a manner acceptable to the Custodian, to have the balance in the custodial account distributed in:

(a) A single sum payment.

(b) An annuity contract that provides equal or substantial equal monthly, quarterly, or annual payments over the life of the Depositor.

(c) An annuity contract that provides equal or substantially equal monthly, quarterly, or annual payments over the joint and last survivor lives of the Depositor and his or her designated beneficiary.

(d) Equal or substantially equal annual payments over a specified period that may not be longer than the Depositor's life expectancy.

(e) Equal or substantially equal annual payments over a specified period that may not be longer than the joint life and last survivor expectancy of the Depositor and his or her designated beneficiary.

4. If the Depositor dies before his or her entire interest is distributed to him or her, the entire remaining interest will be distributed as follows:

(a) If the Depositor dies on or after distribution of his or her interest has begun, distribution must continue to be made in accordance with paragraph 3.

(b) If the Depositor dies before distribution of his or her interest has begun, the entire remaining interest will, at the election of the Depositor, or if the Depositor has not so elected, at the election of the beneficiary or beneficiaries, either

(i) Be distributed by the December 31 of the year containing the fifth anniversary of the Depositor's death, or

(ii) Be distributed in equal or substantially equal payments over the life or life expectancy of the designated beneficiary or beneficiaries starting by December 31 of the year following the year of the Depositor's death. If, however, the beneficiary is the Depositor's surviving spouse, then this distribution is not required to begin before December 31 of the year in which the Depositor would have turned 70 1/2.

(c) Except where distribution in the form of an annuity meeting the requirements of section 408(b)(3) and its related regulations has irrevocably commenced, distributions are treated as having begun on the Depositor's required beginning date, even though payments may actually have been made before that date.

(d) If the depositor dies before his or her entire interest has been distributed and if the beneficiary is other than the surviving spouse, no additional case contributions or rollover contributions may be accepted in the account.

Both IRA agreements included an IRA Disclosure Statement, which states the following regarding withdrawals:

> 10. **Federal Penalties.** In addition to the taxes imposed on IRAs, distributions from IRAs are also potentially subject to a wide variety of penalties (excise taxes).
> A. **Penalty for Premature Distribution.** Generally, if you take a distribution from your IRA before you reach the age 59 1/2 , you will owe, in addition to regular income taxes, a 10% excise tax on the taxable amount of the distribution. Exceptions to the 10% excise tax in the case of disability, death, a first home, qualified higher education expenses, distribution for health care expenses exceeding 7.5% of your adjusted gross income, distributions used to pay for health care insurance if you are unemployed, or if you agree to take a series of substantially equal periodic payments made over your life expectancy or the joint life expectancy of yourself and your designated beneficiary.

Based on the language of the IRA agreements, the Court finds that Debtors have an immediate right to withdraw the funds in the IRAs. The only impediment to the Debtors' right to withdraw is the 10% excise tax penalty referenced in the IRA Disclosure Statement.

III. *Conclusions of Law.*

The Trustee does not dispute that Debtors are entitled to exempt $10,681.00 of the IRAs pursuant to 11 U.S.C. § 522(d)(5). The only issue before the Court is whether Debtors are entitled to exempt the remaining $44,352.48 of the IRAs

pursuant to 11 U.S.C. § 522(d)(10)(E), which provides:

> (d) The following property may be exempted under subsection (b)(1) of this section:
> (10) The debtor's right to receive—
> (E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless--
> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
> (ii) such payment is on account of age or length of service; and
> (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

11 U.S.C. § 522(d)(10)(E).

In interpreting § 522(d)(10)(E), the Court is mindful of the familiar principle that "exemption statutes must be construed liberally in favor of the debtor and in light of the purposes of the exemption." *In re Andersen*, 259 B.R. 687, 690 (8th Cir. BAP 2001) (citing *In re Wallerstedt*, 930 F.2d 630, 631 (8th Cir.1991)). However, the liberal construction of exemption statutes is "for the purpose of achieving the legislative intent, not to 'extend the provisions of the legislative grant.' " *Eilbert v. Pelican (In re Eilbert)*, 162 F.3d 523 (8th Cir.1998) (citations omitted). The purpose of exempting the right to payments under a pension, annuity, or similar plan is to "protect payments which function as wage substitutes after retirement." *Id.* The exemption is intended to

protect payments that "support basic living requirements during the time of life when earning capacity is limited by age, disability, or illness." *Id.*

The Eighth Circuit Bankruptcy Appellate Panel has crafted a three prong test for the § 522(d)(10)(e) exemption. Specifically, the right to payment is exempt only to the extent the following conditions apply:

> (1) they [the payments] are received pursuant to a "pension, annuity, or similar plan or contract,"
> (2) "on account of illness, disability, death, age or length of service," and
> (3) are reasonably necessary for the debtor's support or for the support of a dependent of the debtor.

Id. (citing generally to *Eilbert*, 162 F.3d at 527-28). Pursuant to Federal Rule of Bankruptcy Procedure 4003(c), the Trustee has the burden to demonstrate that the conditions of the exemption are not met. *Id.* If any of the conditions of the exemption are not met, Debtors may not claim the exemption.

A. *Are the payments received pursuant to a pension, annuity, or similar plan or contract?*

The Court must first determine whether the IRAs constitute pensions, annuities, or similar plans or contracts within the meaning of § 522(d)(10)(E). Section 522(d)(10)(E), particularly as applied to IRAs that qualify for tax-exempt status under § 408 of the Internal Revenue Code, has been the subject of much judicial interpretation, and a significant amount of judicial consternation.[1] It seems the

[1] One court has described the language of § 522(d)(10)(E) as "seemingly irreconcilable" and requiring a navigation between the " 'Scylla of rigid

number of different judicial interpretations of the § 522(d)(10)(E) exemption is limited only to the number of courts that analyze the issue.

At least four of the circuit courts of appeals have reached the conclusion that "some--if not all--IRAs were intended to be included in the phrase 'similar plan or contract.' "*In re Carmichael*, 100 F.3d 375, 378 (5th Cir.1996); see also *In re Dubroff*, 119 F.3d 75 (2d Cir.1997); *In re McKown*, 203 F.3d 1188 (9th Cir.2000); *In re Brucher*, 243 F.3d 242 (6th Cir.2001). Although each of the four circuits employs a unique analysis of the issue, each of the four opinions contains a common thread--the notion that Congress's mention of Internal Revenue Code § 408 in subparagraph (d)(10)(E)(iii) compels a holding that Congress intended for IRAs to be included in the § 522(d)(10)(E) exemption.

The *Carmichael* court noted that subparagraph (d)(10)(E)(iii) "specifically denies exemption to those 'similar plans or contracts' that come within the proscription of (d)(10)(E)(i) and (d)(10)(E)(ii) and also fail to qualify under ... § 408." *Carmichael*, 100 F.3d at 378. The *Carmichael* court surmised that if IRAs are not "similar plans or contracts," "there would be no exempt § 408 plans or contracts from which ... § 408 plans or contracts could be exceptions." *Id.* The *Carmichael* court also proposed that IRAs should be included in the exemption because they are substitutes for future earnings; to hold otherwise would penalize self-employed individuals who chose to depend on IRAs for retirement; and "exempting IRAs comports with the very policy furthered by exemptions-providing the honest debtor with a fresh start" by "protecting a debtor's future income stream." *Id.*

The *Dubroff* court, interpreting a New York statute materially identical to § 522(d)(10)(E), rejected the

construction' and the 'Charybdis of meaninglessness.' "*In re Dale*, 252 B.R. 430, 432 (Bankr.W.D.Mich.2000).

proposition that its "initial task in interpreting [the exemption] is to determine whether an IRA is a 'similar plan or contract.'" *Dubroff*, 119 F.3d at 77. The court reasoned that "if [it] were to do so and reach the conclusion that an IRA was not a 'similar plan or contract,' [subparagraph (iii)] would become surplusage." *Id.*

The *McKown* court, citing *Carmichael* and *Dubroff*, posed the rhetorical question "[w]hy would Congress talk about IRAs in the exception unless it included IRAs in the rule?" *McKown*, 203 F.3d at 1190. The court concluded that "[Congress] would not. ... There could be no reason for legislators to exclude non-qualifying IRAs from the exemption, as the exception does, unless they intended that qualifying IRAs could be exempt." *Id.*

The most recent circuit court decision on the issue, *Brucher*, essentially follows the reasoning set forth in *Carmichael*. The *Brucher* court determined that "[i]f IRAs were never to be exempted under § 522(d)(10)(E), the inclusion in subsection (iii) of the reference to section 408 would have been utterly pointless." *Brucher*, 243 F.3d at 243.

Debtor urges the Court to follow the reasoning set forth in *Carmichael*, *Dubroff*, *McKown*, and *Brucher*, and hold that Debtor's IRA is a "similar plan or contract" under § 522(d)(10)(E). However, for the Court to so hold, it would have to ignore considerable Eighth Circuit precedent.

The Eighth Circuit first interpreted the phrase "similar plan or contract" in *Huebner v. Farmers State Bank (In re Huebner)*, 986 F.2d 1222 (8th Cir.1993). In *Huebner*, the issue before the court was whether the debtor could claim an exemption in two flexible premium annuities. Both annuities qualified as IRAs under § 408 of the Internal Revenue Code. *Huebner*, 986 F.2d at 1224. The exemption issue was analyzed under an Iowa statute, as Iowa has opted out of the federal exemption scheme. The Iowa statute at issue was materially similar to § 522(d)(10)(E), allowing debtor to exempt the right to payment under "a pension, annuity, or similar plan or contract on account of illness, disability, death,

age or length of service." *Id.* The Eighth Circuit later described the Iowa statute as "nearly identical" to and "borrowed from" § 522(d)(10)(E).[2]

Like the Debtors in this case, the debtor in *Huebner* had "the unfettered discretion to receive payments at any time ... subject only to relatively modest penalties for withdrawals before age 59 1/2 ." *Id.* The court determined that the debtor's "access to and complete control over the timing of the annuity payments mean[s] that any payments received under the contracts would not be 'on account of' his age." *Id.* Accordingly, the court determined that the IRAs were not "similar plans or contracts." In so holding, the court observed that the debtor "could have invested his savings in retirement annuities that prevented him from withdrawing funds prior to his reaching retirement age, in which event retirement payments under those annuities would have been exempt." *Id.* Instead of choosing that option, the debtor "decided to invest in annuities that place virtually no restrictions on his right to withdraw." *Id.* The court found that "[s]uch assets are essentially 'bank savings accounts' with favorable tax treatment." *Id.*

The Eighth Circuit Bankruptcy Appellate Panel (the "B.A.P.") analyzed the "similar plan or contract" language of the Iowa statute in *Eilbert v. Pelican (In re Eilbert)*, 212 B.R. 954 (8th Cir. BAP 1997). The B.A.P. identified four factors a court may use to aid its determination of whether a particular annuity is a "similar plan or contract." First, a court may consider whether the debtor made contributions to the annuity over time. *Id.* at 958-59. Second, a court may consider whether the investment was purchased in isolation, or whether it included contributions by others. *Id.* at 959. Third, a court may look to the debtor's return on an investment. *Id.* Finally, a court may consider the extent to which the debtor may

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[2] The Court recognizes that the Iowa statute lacked the internal reference to § 408 that influenced the holdings in *Carmichael*, *Dubroff*, *McKown*, and *Brucher*.

control the annuity. The court held that "if the debtor has complete discretion to withdraw the entire corpus, then the contract resembles a non-exempt investment." *Id.* The final factor was apparently conclusive to the B.A.P. Because the debtor "enjoyed unfettered discretion to liquidate the corpus at any time, subject only to contractual penalties assessed against principal," the B.A.P. determined that the annuity was not a "similar plan or contract." *Id.* at 959-60. In addition, the B.A.P. stated that "[a] contractual or tax penalty is not necessarily a limitation on withdrawal." *Id.* at 959.

The B.A.P. decision was affirmed by the Eighth Circuit. *Eilbert v. Pelican (In re Eilbert)*, 162 F.3d 523 (8th Cir.1998). In affirming the B.A.P.'s decision, the court stated that "similar plan or contract" includes within the exemption "retirement plans or investments that are 'created to fill or supplement a wage or salary void.' " *Eilbert*, 162 F.3d at 527. Because the debtor's annuity did not replace lost income, was not purchased with contributions over time as part of a long term retirement strategy, and was purchased as a pre-bankruptcy planning measure, the court determined that the annuity was not a "similar plan or contract" included within the exemption. *Id.*

The B.A.P. recently re-visited the "similar plan or contract" issue in *Andersen v. Ries (In re Andersen)*, 259 B.R. 687 (8th Cir. BAP 2001). In *Andersen*, the debtor used a $40,000.00 inheritance to purchase an annuity in lieu of a retirement plan. *Andersen*, 259 B.R. at 689. Before reaching retirement age, and before filing bankruptcy, the debtor made the required election on the annuity to state the date on which she would begin receiving payments. *Id.* Upon making the election, the debtor lost the discretion to withdraw, settle, or surrender the corpus of the annuity. *Id.* At the time she filed bankruptcy, the debtor was retired and receiving monthly annuity payments. *Id.*

In *Andersen*, the B.A.P. looked to the analysis performed in *Eilbert*, and stated that "numerous factors may be considered" in determining whether an annuity is a

"similar plan or contract." As in *Eilbert*, the B.A.P. stated that specific queries may include:

> * Were the payments designed or intended to be a wage substitute?
> * Were the contributions made over time? The longer the period of investment, the more likely the investment falls within the ambit of the statute and is the result of a long standing retirement strategy, not merely a recent change in the nature of the asset.
> * Do multiple contributors exist? Investments purchased in isolation, outside the context of workplace contributions, may be less likely to qualify as exempt.
> * What is the return on investment? An investment which returns only the initial contribution with earned interest or income is more likely to be a nonexempt investment. In contrast, investments which compute payments based upon the participant's estimated life span, but which terminate upon the participant's death or the actual life span, are akin to a retirement investment plan. That is, will the debtor enjoy a windfall if she outlives her life expectancy? Is she penalized if she dies prematurely?
> * What control may the debtor exercise over the asset? If the debtor has discretion to withdraw from the corpus, then the contract most closely resembles a nonexempt investment.

FN1. This was the obstacle that the debtor in *Huebner v. Farmers State Bank (In re Huebner)*, 986 F.2d 1222 (8th Cir.), *cert. denied*, 510 U.S. 900, 114 S.Ct. 272, 126 L.Ed.2d 223 (1993) could not overcome.

Andersen, 259 B.R. at 691.

The Eighth Circuit's analysis of the "similar plan or contract" issue stands in stark contrast to the *Carmichael*, *Dubroff*, *McKown*, and *Brucher* holdings, each of which suggests that IRAs fall within the "similar plan or contract" language *per se*. This Court is bound to follow the precedent of the Eighth Circuit.[3] Moreover, this Court is convinced that the Eighth Circuit analysis is the better rule of law.

The rule adopted in *Carmichael*, *Dubroff*, *McKown*, and *Brucher* (the "Per Se Exemption") requires leaps of statutory construction that this Court is not willing to make. The courts that have adopted the Per Se Exemption argue that holding otherwise would render the mention of § 408 in subparagraph (d)(10)(E)(iii) of § 522 surplusage. However, this Court believes that adopting a Per Se Exemption of IRAs would render the "similar plan or contract" language of paragraph (d)(10)(E) surplusage in cases involving IRAs.[4]

This Court, like another court that researched the issue, "cannot find anything within the Bankruptcy Code or the legislative history which manifests a Congressional intent to exempt retirement plans in toto." *In re Dale*, 252 B.R. 430,

[3] None of the Eighth Circuit cases cited herein involve both the federal § 522(d)(10)(E) exemption and a § 408 IRA. Nonetheless, the Court finds no indication in the Eighth Circuit opinions that the court would forego its analysis of the "similar plan or contract" requirement merely because subparagraph (iii) of § 522(d)(10)(E) mentions § 408.

[4] Moreover, the Court perceives an inconsistency in the manner the *Carmichael* court applied the Per Se Exemption. Specifically, the *Carmichael* court dispensed of the "similar plan or contract" and "on account of illness, disability, death, age, or length of service" requirements of paragraph (d)(10)(E), but nonetheless imposed the "reasonable necessary for the support of the debtor and any dependent of the debtor" requirement of (d)(10)(E). If the *Carmichael* court determined that (d)(10)(E)(iii) requires the exemption of IRAs *per se*, then all IRAs, even those not reasonably necessary for support, should be exempt. The Court does not believe that Congress intended such a result.

434 (Bankr.W.D.Mich.2000). In fact, the evidence is quite to the contrary. If Congress intended to enact a Per Se Exemption of § 408 IRAs, it could have done so by simply stating that "a right to receive payment from an individual retirement annuity qualified for tax exempt status under 26 U.S.C. § 408 shall be exempt." In the absence of such a specific enactment, the Court refuses to infer that Congress manifested any such intent by mentioning § 408 in subparagraph (iii) of § 522(d)(10)(E).

Statutory provisions, such as subparagraph (d)(10)(E)(iii), must be construed *in pari materia*, that is, in reference to one another. *In re Zott*, 225 B.R. 160, 167 (Bankr.E.D.Mich.1998). Statutory language must be evaluated in context, and the Supreme Court has observed that the plain meaning a court should attempt to discern is the plain meaning of the whole statute, not of isolated sentences. *Beecham v. United States*, 511 U.S. 368, 372 (1994). Courts should avoid interpretations that render statutory terms as surplusage. *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 698 (1995). If at all possible, courts should strive to read the provisions of a statute as harmonious with each other.

The Court concludes that the most harmonious interpretation of § 522(d)(10)(E) is that Congress intended to exempt § 408 IRAs to the extent they are "similar plans or contracts"; payable "on account of illness, disability, death, age or length of service"; and "reasonably necessary for the support of the debtor and any dependent of the debtor." This interpretation gives meaning to the requirements of paragraph (d)(10)(E), without ignoring the mention of § 408 in subparagraph (d)(10)(iii). Under this interpretation, no part of the statute is surplusage.[5]

[5] One might argue that this interpretation renders IRAs, as they exist today, non-exemptible *de facto* because IRAs are standardized agreements, allowing for preset payment with a tax penalty imposed for withdrawal before age 59 1/2. Therefore, it may be that few, if any, IRAs meet the "on account of" requirement. In fact, one court has held that

Based on the Eighth Circuit's decision in *Huebner*, the Court concludes that the IRAs in this case are not "similar plans or contracts." In *Huebner*, the Eighth Circuit specifically held that an IRA is not a "similar plan or contract" where the debtor has unfettered discretion to withdraw from the corpus. *Huebner*, 986 F.2d 1222.

In this case, both Debtors' testimony and the language of the IRA agreements establish that Debtors may withdraw from the corpora of the IRAs at any time, subject only to a 10% excise tax penalty. The Court concludes that Debtors' IRAs are not "similar plans or contracts" within the meaning of § 522(d)(10)(E).

B. *Are the payments on account of illness, disability, death, age, or length of service?*

The Court's conclusion that the IRAs are not "similar plans or contracts" is sufficient to sustain the Trustee's objections to exemptions and grant the Trustee's motion for turnover. However, because the Court has heard evidence as to whether the right to payment under Debtors' IRAs are triggered by illness, disability, death, age or length of service, the Court will also issue findings on that issue.[6] The Eighth

---

IRAs, as they exist today, are non-exempt *per se* under § 522(d)(10)(E). *In re Zott*, 225 B.R. at 168. However, this Court finds no reason why IRAs that meet the "on account of" requirement cannot be drafted. There is nothing in the Internal Revenue Code or tax regulations to prevent a person from including a spendthrift provision in his IRA contract that takes away discretion to access the corpus of the account. *Id.* If, as the *Zott* court believed, it is "unlikely" that individuals would insist on such a provision, and if Congress determines that all IRAs should be exempt, then Congress should amend § 522 to exempt all IRAs. The Court must assiduously avoid the temptation to "fix" statutes. *In re Widdicombe*, 269 B.R. 803, 807 (Bankr.W.D.Ark.2001).

[6] Other Courts have disregarded this requirement with regard to § 408 IRAs. See *Brucher*, 243 F.3d at 244. For the reasons set forth previously in this opinion, this Court will adhere to Eighth Circuit precedent and give meaning to all of the requirements of § 522(d)(10)(E).

Circuit has held that in order for an annuity to qualify for the exemption, "the debtor may not have access to or control over the timing of the annuity payments." *Huebner*, 986 F.2d at 1225; see also *Eilbert*, 162 F.3d at 527; *Andersen*, 259 B.R. at 693. Access to and control over the timing of annuity payments mean that any payments received are not "on account of age." *Id.* The ten percent federal tax penalty imposed on early withdrawals from a § 408 IRA has been described by the Eighth Circuit as "relatively modest," and does not constitute a restriction on the right to withdraw. *Id.*

In this case, the testimony of Debtors and the language of the IRA agreements establish that Debtors may withdraw from the IRAs at any time. Therefore, Debtors' right to payment under the IRAs is not on account of illness, disability, death, age, or length of service, and Debtors right to payment under the IRAs is not entitled to an exemption under § 522(d)(10)(E).

IV. *Conclusion.*

The IRAs do not meet the first two requirements of § 522(d)(10)(E). Accordingly, Debtors are not entitled to claim exemptions pursuant to that section. The Trustee's objection to exemptions and objections to amended exemptions are hereby SUSTAINED and the Trustee's motion for turnover is hereby GRANTED, provided that Debtors are entitled to their "wildcard exemption" in the total amount of $10,681.00 pursuant to 11 U.S.C. § 522(d)(5).

IT IS SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-3505

RICHARD ROUSEY, ET AL.,
APPELLANTS,

v.

JILL R. JACOWAY,
APPELLEE.

ORDER DENYING PETITION FOR REHEARING
AND FOR REHEARING EN BANC

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Bye, Judge Riley, Judge Melloy and Judge Smith would grant the petition for rehearing en banc.

January 9, 2004

(2)

Supreme Court, U.S.
FILED
MAY 10 2004
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No. 03-1407

IN THE

Supreme Court of the United States

RICHARD GERALD ROUSEY, *et ux.*,

Petitioners,

v.

JILL R. JACOWAY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the Eighth Circuit Court of Appeals correct in denying the petitioners' exemptions claimed pursuant to 11 U.S.C. § 522(d)(10)(E) in Individual Retirement Accounts because the accounts do not qualify as "similar plans or contracts" and their ability to control, access, and withdraw funds from the accounts is not "on account of illness, disability, death, age, or length of service?"

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26 U.S.C. § 408	7, 8, 9

STATEMENT OF THE CASE

A debtor's interest in an Individual Retirement Account qualifies as property of the estate. 11 U.S.C. § 541(a)(1) (debtor's estate includes "all the legal and equitable interests of the debtor in the property as of the commencement of the case.") A debtor is entitled to exempt certain property from the estate according to the exemption scheme chosen by the debtor and if the state allows such an option. 11 U.S.C. § 522(b)(2). Arkansas "opted-in" to the federal exemptions; therefore, debtors can utilize the available exemptions under 11 U.S.C. § 522(b)(1). The petitioners claim exemptions for their Individual Retirement Accounts under 11 U.S.C. § 522(d)(10)(E) which sets forth that a debtor can claim a:

> right to receive . . . a payment under a stock bonus, pension profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age or length of service, to the extent reasonably necessary for the support of the debtor and any dependant of the debtor, unless –
>
> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
>
> (ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

The petitioners filed for Chapter 7 bankruptcy protection on April 27th, 2001. The petitioners, upon their "Schedule C – Property Claimed as Exempt" as filed with their bankruptcy petition, claimed portions of two separate Individual Retirement Accounts exempt pursuant to 11 U.S.C. § 522(d)(10)(E). Pet. App. 20a. Richard Gerald Rousey exempted $5,033.00 of the value of the IRA under his "wildcard exemption," 11 U.S.C. § 522(d)(5), and claimed the remaining $37,882.32 as exempt pursuant to 11 U.S.C. § 522(d)(10)(E). Betty Jo Rousey exempted $5,648.00 of the value of her IRA pursuant to 11 U.S.C. § 522(d)(5). The remaining amount of $6,470.10 Betty Jo Rousey claimed as exempt under to 11 U.S.C. § 522(d)(10)(E). Pet. App. 20a. The parties stipulated that the Trustee's objection is limited to only the funds claimed as exempt by the petitioners under 11 U.S.C. § 522(d)(10)(E) and not the amounts they each claimed under 11 U.S.C. § 522(d)(5). Pet. App. 21a.

The bankruptcy court entered the order sustaining the Trustee's objection to the claim of exemptions and granting the motion for turnover as to the amounts Richard Rousey and Betty Jo Rousey claimed exempt pursuant to 11 U.S.C. § 522(d)(10)(E). Pet. App. 35a. Whereas the bankruptcy court held that the petitioners' IRAs are not "similar plans or contracts" within the scope of the statute and the petitioners' ability to withdraw funds from the accounts at their discretion rendered the payments not "on account of illness, disability, death, age, or length of service," the issue as whether the accounts are "reasonably necessary for the support of the debtor or dependent of the debtor" was not addressed.

Pet. App. 34a-35a. The bankruptcy court did not reach the issue of "reasonably necessary for support" because it had determined that "[i]f any of the conditions of the exemption are not met, Debtors may not claim the exemption." Pet. App. 26a. The Bankruptcy Appellate Panel for the Eighth Circuit Court of Appeals affirmed the bankruptcy court's holding. Pet. App. 17a. The decision of the bankruptcy appellate panel was affirmed by the Eighth Circuit Court of Appeals. Pet. App. 6a. The petitioners timely requested rehearing and rehearing *en banc* which were denied. Pet. App. 36a.

REASONS FOR DENYING THE PETITION

The issues raised by the petitioners do not warrant review by this Court. The petitioners want this Court to revisit the circuit court's decision, apply the policy considerations that have been utilized in the Second, Fifth, Sixth, and Ninth Circuits, and thereby circumvent the requirements that Congress allotted in 11 U.S.C. § 522(d)(10)(E). The Eighth Circuit correctly determined that 11 U.S.C. § 522(d)(10)(E) requires the payments from "a similar plan or contract" be "on account of illness, disability, death, age, or length of service" to qualify for the exemption. Pet. App. 6a. The request for a writ of certiorari should be denied because the Eighth Circuit correctly applied the terms of 11 U.S.C. § 522(d)(10)(E) to the petitioners' IRAs and concluded, based upon both long-established precedent and the rules of statutory interpretation, that the accounts did not qualify for the exemption.

I. The Circuit Court Conflict Does Not Warrant Review.

Petitioners claim that the Eighth Circuit decision in this case created a conflict in the circuits. In actuality, the Eighth Circuit has held the same position as to the interpretation of the material terms of 11 U.S.C. § 522(d)(10)(E) at issue in this matter since 1993. The long-established precedent in the Eighth Circuit applying the terms "similar plan or contract" and "on account of illness, disability, death, age, and length of service" is *Huebner v. Farmers State Bank*, 986 F.2d 1222 (CA8 1993), *cert. denied*, 510 U.S. 900 (1993). At issue in *Huebner* was whether a debtor's annuity was exempt pursuant to the Iowa exemption statute. The previous incarnation of the Iowa statute, which set forth the exemption at issue in *Huebner*, was modeled upon 11 U.S.C. § 522(d)(10)(E), containing the material provisions regarding whether an account or annuity qualified as a "similar plan or contract" and whether the right to payment was "on account of illness, disability, death, age, and length of service." *Id.* at 1224-1225. The *Huebner* decision denying the debtor's claim of exemption in his annuity focused upon the court finding that, in spite of "relatively modest penalties" the debtor was assessed for withdrawing from his IRA prior to attaining the age of 59½, the debtor's access and control over the account was "not substantially restricted." *Id.* at 1224. The debtor having "access to and complete control over" the account rendered the payments not "on account of age." *Id.* at 1224. The Eighth Circuit applied the *Huebner* analysis to the exemption claimed by the petitioners in their IRAs and denied the claimed exemption. The Eighth Circuit's opinion creates no substantial change; therefore, there is no compelling reason to review this case. In fact, the decision does not deviate from the status quo that has been in place for 11 years in the Eighth Circuit.

The conflict in the circuit court opinions are insufficient to merit certiorari. The Second, Fifth, Sixth, and Ninth Circuits have held that IRAs are exempt pursuant to 11 U.S.C. § 522(d)(10)(E) or pursuant to state statutes which are materially identical to 11 U.S.C. § 522(d)(10)(E).[1] Those circuits set forth a *per se* rule whereby all IRAs are exempt. In contrast, the Eighth Circuit held that the petitioners' IRAs did not require the right to payment to be "on account of illness, disability, death, age, and length of service" and were, as a result, not exempt. Pet. App. 6a. The Eighth Circuit did not adopt the *per se* rule which the Second, Fifth, Sixth, and Ninth Circuits utilize. Rather, the Eighth Circuit applies the statutory requirements of 11 U.S.C. § 522(d)(10)(E) on a case-by-case basis to determine a debtor's entitlement to a claim of exemption.

There is no conflict with this decision and Third Circuit precedent. The decisions of the Third Circuit Court of Appeals are not germane to the claimed circuit split nor to any determination on the merits of this case. The Third Circuit Court of Appeals cases implicated by the petitioners as creating the three-way circuit split are dated, archaic, and irrelevant to the issues relating to the Eighth Circuit's holding in this case. Pet. 9. Even the Fifth Circuit Court of Appeals has acknowledged no conflict with the Third Circuit Court of Appeals decisions exists.[2] Currently there is no published

1. *See Dettman v. Brucher (In re Brucher)*, 243 F.3d 242 (CA6 2001); *Farrar v. McKown*, 203 F.3d 1188 (CA9 2000); *Dubroff v. First Nat'l Bank of Glens Falls (In re Dubroff)*, 119 F.3d 75 (CA2 1997); *Carmichael v. Osherow (In re Carmichael)*, 100 F.3d 375 (CA5 1996).

2. The Fifth Circuit Court of Appeals in *Carmichael* recognized that the Third Circuit's holding in *Clark v. O'Neill (In re Clark)*, (Cont'd)

opinion in the Third Circuit in which the court interprets the language "similar plan or contract" and the right to payment "on account of illness, disability, death, age, and length of service" contained in 11 U.S.C. § 522(d)(10)(E) which would be applicable to this case.

II. The Impact of This Case Upon Individual Retirement Accounts is Overstated by Petitioners

The emphasis the petitioners place upon this case to establish a uniform rule for the exemption of IRAs is misguided. Pet. 14. The implication that a uniform rule would result from a decision in this case is illusory as certainty would only extend to jurisdictions opting-in to the federal bankruptcy exemption scheme[3] or having state statutes materially identical to 11 U.S.C. § 522(d)(10)(E). The fact that the bankruptcy code allows states to either opt in or opt out of the federal bankruptcy exemption scheme creates ambiguity in the exemptions allotted to debtors.

(Cont'd)
711 F.2d 21 (CA3 1983) "is obsolete, so no actual conflict can be created with that decision." *Carmichael* at 380. Further, the Fifth Circuit determined the holding in *Velis v. Kardanis*, 949 F.2d 78 (CA3 1991) also does not create a conflict because it only applies to the interpretation of the limitation "to the extent reasonably necessary" contained within 11 U.S.C. § 522(d)(10)(E). *Id.*

3. 11 U.S.C. § 522(b)(1) allows a debtor to choose to claim property as exempt from the bankruptcy estate pursuant to either state or federal law. However, not all states allow debtors to elect the federal exemptions contained within 11 U.S.C. § 522(d), thereby limiting debtors to exempt property solely pursuant to the laws of the state in which the debtor has filed the bankruptcy. See 11 U.S.C. § 522(b)(1).

The exemptions a debtor has available depend upon the jurisdiction in which the debtor files a bankruptcy petition and the date the petition is filed. Thus, the lack of uniformity in the exemptions is due not only to the contradictory interpretations by the courts, but also substantially to the variations in the exemption statutes in different jurisdictions. The result of differing interpretations of exemption statutes does not create any more uncertainty for debtors than the availability of distinct exemptions based upon the location of the debtors at the time of filing.[4]

III. The Eighth Circuit's Opinion Is Correct on the Merits.

Review of this case is not justified because the decision of the Eighth Circuit is based upon the only logical interpretation and application of the statute. The petitioners mischaracterize the Eighth Circuit's finding as the court did not explicitly state that the petitioners' IRAs were "similar plans or contracts." Pet. 4. Rather, the court only concluded that "Congress probably intended some IRAs" to qualify as "similar plans of contracts." Pet. App. 5a. The court clarified its position by stating that, "if Congress had intended all IRAs which qualify under § 408 to be exemptible as a 'similar plan or contract,' it would have been a very easy legislative task to have affirmatively accomplished." Pet. App. 5a-6a.

---

4. 11 U.S.C. § 522(b)(2)(A) sets forth that a debtor is to utilize the exemptions "applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place."

It is fundamental to the Trustee's argument that courts are bound to apply a statute as written by Congress. A court is not to alter or amend the law but to apply the statutory language as it is written. *See Hartford Underwriters Insurance Company v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). The Eighth Circuit Court of Appeals in *Huebner* applied the terms of the Iowa exemption statute to the annuity that the debtor in *Huebner* was claiming as exempt. *Huebner* at 1225. The annuity did not meet the requirements for the exemption permitted pursuant to the Iowa statute, and, as a result, the annuity was not eligible for such exemption. *Id.* Subsequent to the *Huebner* decision, the Iowa legislature revised the Iowa statutory exemption pertaining to Individual Retirement Accounts.[5] Such a change in the exemption allotted to a debtor in the state of Iowa was brought about by a change in statutory wording, not by the Eighth Circuit's decision in the *Huebner* case. The correct implement for statutory construction and interpretation is to enforce a statute as written.

It is illogical to determine that Congress would have explicitly stated restrictive factors for entitlement to an exemption if no intent existed to limit such an exemption to payments prompted by one of those delineated factors. The Eighth Circuit correctly interpreted that the reference to 26 U.S.C. § 408 contained within 11 U.S.C. § 522(d)(10)(E)(iii) does not automatically render all IRAs exempt.[6] A conclusion otherwise required the court to

5. The Iowa General Assembly revised Iowa Code § 627.6(8)(f) in 2001.

6. The bankruptcy appellate panel determined the requirement that the "plan or contract qualify under section . . . 408 of the Internal Revenue Code of 1986" as written in 11 U.S.C. § 522(d)(10)(E)(iii) (Cont'd)

disregard the exclusive laundry list of factors set forth in 11 U.S.C. § 522(d)(10)(E) that trigger a debtor's right to receive a payment. Pet. App. 6a. A statute "ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant." *TRW INC. vs Andrews*, 534 U.S. 19, 31 (2001). The Eighth Circuit recognized that specific, triggering events are enumerated in 11 U.S.C. § 522(d)(10)(E), and that the court should not read in additional factors that would invoke the debtor's right to payment. Resulting by negative implication is that any other factor that triggers the debtor's right to payment precludes the account from qualification under 11 U.S.C. § 522(d)(10)(E). If there were an unlimited number of events that would allow a debtor to claim an exemption in a right to receive a payment, it would serve no purpose to list specific requirements for exemption as set out 11 U.S.C. § 522(d)(10)(E). Applicable here is the statutory construction *expressio unius est exclusio alterius*. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of contrary legislative intent." *Id.* at 28 (citing *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-617 (1980)).

(Cont'd)
is a "limitation on the right to claim the exemption." Pet. App. 16a. (Bankruptcy Appellate Panel refusing to infer that the reference to 26 U.S.C. § 408 in 11 U.S.C. § 522(d)(10)(E)(iii) renders all IRAs exempt. "We have trouble elevating a limitation into a new per se exemption.")

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

Richard Gerald Rousey and Betty Jo Rousey,
Petitioners,

v.

Jill R. Jacoway.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

There is no dispute that this case squarely presents the three-way circuit conflict regarding whether and under what circumstances payments from an Individual Retirement Account (IRA) can be exempt from property of the estate under 11 U.S.C. 522(d)(10)(E). The Second, Fifth, Sixth, and Ninth Circuits allow exemption for funds in a standard IRA "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor," 11 U.S.C. 522(d)(10)(E). See Pet. 6-7. Under that rule, the funds in petitioners' IRAs unquestionably would have been eligible for exemption. The Eighth Circuit, however, effectively bars all IRAs from exemption. See Pet. App. 6a. The Third Circuit takes yet another position, allowing exemption for an IRA only when the debtor has reached the age of 59½ at the time he or she files for bankruptcy. See Pet. 9-10.

Respondent has no answer to the petition's showing that the conflict over the question presented profoundly affects the millions of Americans who hold IRAs (see Pet. 12), is frequently litigated (see *id.* at 13-14), and cannot resolve itself absent this Court's intervention (see *id.* at 10-11). Despite the panel's recognition of the circuit split and its further recognition that settled Eighth Circuit precedent was likely erroneous (see Pet. App. 6a), the full court denied rehearing en banc (*id.* at 36a). The Third Circuit's rule has similarly been entrenched for over twenty years. See Pet. 10. Few debtors in bankruptcy have the resources to mount a quixotic challenge to circuit precedent that the courts of appeals appear unwilling to revisit absent further guidance from this Court. Thus, this case presents a rare opportunity for this Court to bring uniformity to this important question of federal law. See *id.* at 11-12.

1. Respondent frankly concedes, as she must, that "[t]he Second, Fifth, Sixth, and Ninth Circuits have held that IRAs are exempt pursuant to 11 U.S.C. § 522(d)(10)(E) or pursuant to state statutes which are materially identical." BIO 5. The

Eighth Circuit, in contrast, holds that no IRA which allows early withdrawal subject to a tax penalty can ever be exempt. Pet. App. 6a (holding that IRA investors' "discretion to withdraw from the corpus at any time subject only to modest early withdrawal tax penalties" disqualifies the plans from Section 522(d) exemption). As the petition demonstrated, that rule apparently encompasses *all* IRAs, because neither petitioners, nor respondent, nor any court has been able to identify an IRA that forbids early withdrawals. See Pet. 8 n.7. Respondent's characterization of the Eighth Circuit rule as calling for "case-by-case" review of individual IRAs (BIO 5) is thus erroneous.

The conflict is broader still because the Third Circuit applies yet another rule, discriminating on the basis of the debtor's age in deciding whether a particular IRA is eligible for exemption. Pet. 9-10; *Clark* v. *O'Neill (In re Clark)*, 711 F.2d 21, 23 (CA3 1983). Respondent's unelaborated suggestion that the Third Circuit rule is no longer good law (see BIO 5) ignores the consistent line of bankruptcy court authority in that circuit applying that rule (see Pet. 9-10 (citing, *e.g.*, *In re Snyder*, 206 B.R. 347, 350 (Bankr. M.D. Pa. 1996) ("While I find that * * * the Debtors have a 'right to payment' in the IRA which falls squarely within the provisions of 11 U.S.C. 522(d)(10)(E), * * * I am stifled in that pursuit by a clear and unambiguous decision of the Third Circuit.")).

2. The proper construction of Section 522(d)(10)(E) is unquestionably of sufficient importance to warrant review in this Court. The question presented determines whether the *millions* of Americans whose retirement savings are held in IRAs – a figure that is only growing with time (see Pet. 12) – will be stripped of those savings should they be forced into bankruptcy.

Respondent suggests that any circuit split relating to the exemption scheme of Section 522(d) lacks sufficient importance to merit review because Section 522 permits states to opt out of the federal exemption scheme and some of the

states that have exercised that option do not parrot the language of Section 522(d)(10)(E). See BIO 6. But when the question presented has broad consequences even within a limited number of states, as here, this Court has not hesitated to grant certiorari. See, *e.g.*, *Equal Opportunity Employment Comm'n* v. *Commercial Office Products Co.*, 486 U.S. 107 (1988) (construing the 300-day statute of limitations in Section 706(e) of Title VII of the Civil Rights Act of 1964, which applies only in jurisdictions that have established fair employment agencies); *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979) (determining how a provision of the Railroad Retirement Act, 45 U.S.C. 231m, operates in states with community property statutes); *Robertson* v. *Wegmann*, 436 U.S. 584 (1978) (construing 42 U.S.C. 1988 to incorporate state survivorship laws only when they are consistent with federal law). Indeed, the Court has even reviewed federal *bankruptcy* statutes that apply only in a "single statutorily defined region." *Railroad Rail Reorganization Act Cases*, 419 U.S. 102, 158 (1974) (reviewing on direct appeal the constitutionality of a bankruptcy provision governing the reorganization of railroads in specified northeastern states). See also, *e.g.*, *Owen* v. *Owen*, 500 U.S. 305 (1991) (addressing the interplay between a state's exemptions and 11 U.S.C. 522(f)). And of course, the Court frequently grants certiorari to resolve constitutional questions that arise in only a subset of the states. See, *e.g.*, *Roper* v. *Simmons*, 124 S. Ct. 1171 (2004) (granting certiorari to determine whether executing juvenile offenders violates the Constitution); *Locke* v. *Davey*, 124 S. Ct. 1307 (2004) (upholding the constitutionality of state refusals under Blaine Amendments to fund students who are pursuing theology degrees).

The Constitution moreover contemplates that Congress will establish "uniform" laws on the subject of bankruptcies. U.S. Const. art. I, § 8, cl. 4. Although Congress has permitted states to require residents to use state-generated lists of exemptions that reflect their distinctive commercial and social contexts, see *Railway Labor Executives' Ass'n* v. *Gibbons*,

455 U.S. 457, 469 (1982) (discussing this longstanding policy). Congress did not contemplate the wholesale abandonment of uniformity with respect to exemptions. Disparate interpretations of the federal exemptions bring none of the benefits associated with deference to the states yet exact all of the costs of nonuniformity. And it perversely requires states in the Eighth and Third Circuits that wish to reinforce Congress's express policy of promoting investment in retirement accounts to opt *out* of the federal exemption scheme.

3. Certiorari is also warranted because the decision below is wrong on the merits. With the exception of the Third and Eighth Circuits, every court to have addressed the issue has agreed that IRAs are eligible for exemption under Section 522(d)(10)(E). Pet. 6-7 & n.6. That near uniform line of authority rejecting the holding adopted in this case notably includes not only five courts of appeals but also *every* bankruptcy court in the remaining circuits that has addressed the question. *Id.* The collective wisdom of the nation's bankruptcy judges should not be discounted.

Respondent suggests that the decisions of all of these courts rest purely on "policy considerations." BIO 3. Not so. The rule adopted by the overwhelming majority of courts rests principally upon the text and structure of the Bankruptcy Code. Section 522(d)(10)(E)(iii) explicitly incorporates the Internal Revenue Code provision that defines IRAs; there would be no purpose in doing so if IRAs were categorically excluded, as the Eighth Circuit effectively held. See Pet. 15. Although respondent asserts the contrary, she gives no alternative explanation for why the statute would contain an internal reference to IRAs. In any event, payments under IRAs are indeed triggered by four of the conditions listed in Section 522(d)(10)(E) as sufficient to justify exemption: illness, disability, death, and age. See Pet. 16.

Finally, respondent's suggestion that the availability of tax-penalized early withdrawal before age 59½ renders an IRA nonexempt fails for three reasons. First, the fact that

early withdrawals *are* penalized demonstrates that IRAs are intended to operate as retirement savings devices, just like pensions, annuities, and the other plans listed in Section 522(d)(10)(E). Second, as the petition demonstrated and respondent does not dispute, her reading would implausibly disqualify not only IRAs, but also *all* the other financial instruments explicitly listed in the statute, because all allow for tax-penalized early withdrawal under federal law. Pet. 16-17 (citing 26 U.S.C. 72(t)). Her reading would thus render Section 522(d)(10)(E) nugatory. Third, respondent's reading is unsupported by the text: payments need not *only* be triggered by the listed conditions in order to be "on account of" these provisions but may also be triggered by other events, such as the holder's decision to remove funds at the expense of the tax penalty. See *In re Carmichael*, 100 F.3d 375, 379 (CA5 1996) (noting that the words "only" or "solely" do not appear in the provision, and holding that "the fact that payments can also be triggered by some additional factor * * * cannot destroy exemptibility").

Because this case squarely presents a frequently recurring question that is essential to the orderly operation of the bankruptcy laws, certiorari should be granted.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

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IN THE

Supreme Court of the United States

RICHARD GERALD ROUSEY and BETTY JO ROUSEY,

Petitioners,

v.

JILL R. JACOWAY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether and to what extent Individual Retirement Accounts (IRAs) are exempt from a bankruptcy estate under 11 U.S.C. 522(d)(10)(E).

PARTIES TO THE PROCEEDINGS BELOW

The only parties to this proceeding are named in the caption.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1a-6a) is published at 347 F.3d 689. The Eighth Circuit's order denying the petition for rehearing and rehearing en banc by a vote of five to four (Pet. App. 36a) is unpublished. The opinion of the Bankruptcy Appellate Panel for the Eighth Circuit (Pet. App. 7a-18a) is published at 283 B.R. 265. The opinion for the Bankruptcy Court for the Western District of Arkansas (Pet. App. 19a-35a) is published at 275 B.R. 307.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2003. A timely petition for rehearing and rehearing en banc was denied on January 9, 2004. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

11 U.S.C. 522 provides, in relevant part:

(d) The following property may be exempted under subsection (b)(1) of this section:

*****

(10) the debtor's right to receive—

*****

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless –

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the

debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

STATEMENT

The question presented by this case is whether and to what extent payments from an Individual Retirement Account (IRA) constitute "exempt property" under 11 U.S.C. 522(d)(10)(E). Acknowledging that its reading of the statute had been rejected by four other courts of appeals, the Eighth Circuit in this case held that IRAs do not qualify for exemption.

1. After twenty-six years of employment with Northrop Grumman Corp., petitioner Richard Gerald Rousey was forced into early retirement in December 1998. His wife, petitioner Betty Jo Rousey, who had been employed with Northrop Grumman for eight-and-a-half years, was laid off the following January.

Due to the termination of their employment, petitioners were required to transfer the funds they had accumulated in their Northrop Grumman retirement plans. They "rolled over" their funds into IRAs that each established at the First National Bank of Berryville (Bank).[1] The IRAs were funded entirely by the proceeds of Mr. Rousey's pension and Mrs. Rousey's 401(k) plan, respectively, and "qualif[ied] for tax-exempt status under § 408" of the Internal Revenue Code. Pet. App. 26a.

[1] Petitioner Richard Rousey established his IRA by a direct rollover of the $38,574.44 from his qualified plan on March 23, 1999; petitioner Betty Jo Rousey established her IRA by a direct rollover of the $11,193.36 from her 401(k) plan on April 26, 1999.

2. Subsequently, petitioners jointly filed a voluntary Chapter 7 petition in the United States Bankruptcy Court for the Western District of Arkansas. When a debtor files a bankruptcy petition, most of the debtor's property becomes part of the bankruptcy estate, which a bankruptcy trustee will convert into cash and distribute to the debtor's creditors. See 11 U.S.C. 541; *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 642 (1992). However, a debtor may seek to retain some of his property by claiming an exemption pursuant to 11 U.S.C. 522. See *Taylor*, 503 U.S. at 642. These exemptions "permit an individual debtor to take out of the [bankruptcy] estate that property that is necessary for a fresh start and for the support of himself and his dependents." H.R. Rep. No. 95-595, at 176 (1977). Pursuant to Section 522(b) of the Bankruptcy Code, petitioners elected to receive the federal exemptions provided for in 11 U.S.C. 522(b)(1), which incorporates the exemptions listed in Section 522(d).[2]

The provision of the Bankruptcy Code at issue in this case, Section 522(d)(10)(E), permits a debtor to exempt "the debtor's right to receive * * * a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract." 11 U.S.C. 522(d)(10)(E). An exemption is allowed only to the extent that the funds are "reasonably necessary for the support of the debtor." *Ibid.*

Pursuant to Section 522(d)(10)(E), petitioners claimed an exemption of $44,352.48 for funds in their IRAs. The trustee objected on the ground that IRAs were not a "similar plan or

[2] The trustee did not object to petitioners' exemption of $10,681 of the value of petitioners' IRAs pursuant to 11 U.S.C. 522(d)(5). Section 522(d)(5), the so-called "wild card" exemption, provides in pertinent part that a debtor can exempt from the bankruptcy estate his "aggregate interest in any property, not to exceed in value $975 plus up to $9,250 [at the time of petitioners' Chapter 7 filing, the amounts were $925 and $8,725] of any unused amount of the exemption provided" elsewhere in the subsection for the debtor's residence or a burial plot (see 11 U.S.C. 522(d)(1)).

contract" within the meaning of Section 522(d)(10)(E). The bankruptcy court agreed, relying on the fact that the holders of IRAs may withdraw funds (albeit subject to a ten-percent tax penalty, see 26 U.S.C. 72(t)(1)) before they reach the age (59½) at which IRA holders are eligible for non-penalized payments under federal law. Pet. App. 34a. According to the bankruptcy court, the ability to make tax-penalized withdrawals from an IRA means that payments are not made "on account of illness, disability, death, age, or length of service" as required by Section 522(d)(10)(E). Pet. App. 34a-35a.

The bankruptcy appellate panel affirmed. Pet. App. 17a. However, a concurring opinion invited the Eighth Circuit to revisit its prior precedent relating to "this issue where, as here, the debtors' pensions would have been exempt had they filed their bankruptcy petition while employed by Northrop Grumman, but they are not exempt where the debtors filed after their employment ceased and they rolled over the proceeds of their Northrop Grumman pensions into IRAs." *Id.* 18a.

3. The Eighth Circuit in turn affirmed, though only on one of the two grounds invoked by the lower courts. Pet. App. 6a. The court of appeals essentially agreed with *petitioners* that an IRA is a "similar plan or contract" within the meaning of Section 522(d)(10)(E). Pet. App. 5a. The Eighth Circuit recognized that, like a pension, the funds in petitioners' IRAs were "established over time as part of a long-term retirement strategy" and "serve[d] as a substitute for future earnings." *Id.* The court of appeals noted that four other circuits had found IRAs to satisfy the "similar plan or contract" test, and that "dicta from the Supreme Court's opinion in *Patterson* [v. *Shumate*, 504 U.S. 753 (1992)] support this conclusion." Pet. App. 5a; see also *id.* 4a (citing *Dettmann* v. *Brucher (In re Brucher)*, 243 F.3d 242 (CA6 2001); *Farrar* v. *McKown*, 203 F.3d 1188 (CA9 2000); *Dubroff* v. *First Nat'l Bank of Glens Falls (In re Dubroff)*, 119 F.3d 75 (CA2 1997); *Carmichael* v. *Osherow (In re Carmichael)*, 100 F.3d 375 (CA5 1996)).

But based on prior Eighth Circuit precedent construing a state exemption statute, the court of appeals held that IRAs were nonetheless not exempt, unless the particular IRA in question categorically forbids early withdrawals. (The court of appeals was unable to identify any such IRAs.) Under that circuit precedent, IRAs do not meet the requirement that any payments be made "on account of * * * age." 11 U.S.C. 522(d)(10)(E). "[F]uture payments from the corpus [principal] of an Individual Retirement Annuity are not 'on account of age' where debtors have unfettered discretion to withdraw from the corpus at any time subject only to modest early withdrawal tax penalties." Pet. App. 6a (quoting *Huebner* v. *Farmers State Bank*, 986 F.2d 1222, 1225 (CA8), cert. denied, 510 U.S. 900 (1993)). The court of appeals acknowledged "that four of our sister circuits have reached a contrary result that may be more consistent with the purposes of § 522," but nevertheless deemed itself "constrained" by circuit precedent to reject that view. Pet. App. 6a.

4. Petitioners' motion for rehearing en banc was denied by a vote of five to four. A petition for a writ of certiorari was filed on April 6, 2004, and granted by this Court on June 7, 2004.

SUMMARY OF THE ARGUMENT

Individual Retirement Accounts (IRAs) are exempt property under Section 522(d)(10)(E). This Court specifically reached that conclusion in *Patterson* v. *Shumate*, 504 U.S. 753, 762-63 (1992), contrasting the scope of Section 522(d)(10)(E) and its application to IRAs with the narrower exemption applicable to plans that contain anti-alienation provisions. The Eighth Circuit's contrary holding denying petitioners' exemption for their IRAs lacks merit.

The court of appeals acknowledged that Congress intended Section 522(d)(10)(E) to encompass at least some IRAs. But it concluded that the statute exempts only those plans or contracts, including IRAs, that categorically forbid early withdrawals. That cannot be right. So far as can be de-

termined, there simply are no IRAs that include such a prohibition, for the Internal Revenue Code authorizes early withdrawals from qualified plans, subject to a tax penalty. Moreover, many plans and contracts that are expressly exempt under Section 522(d)(10)(E) permit early withdrawals. For example, pre-retirement withdrawals from 401(k) pension plans upon the termination of employment are common. The Eighth Circuit's decision therefore implausibly excludes from exemption many of the plans that Congress expressly included.

The judgment below thus can be sustained only if an IRA is not a "similar plan or contract" for purposes of Section 522(d)(10)(E). But even the court of appeals recognized that such a conclusion cannot be supported. The statutory text is dispositive. It expressly refers to the Internal Revenue Code provision governing IRAs.

Further, IRAs are indisputably "similar" to the plans and contracts that Congress expressly identified in Section 522(d)(10)(E). IRAs, like those devices, permit withdrawals without tax penalties on the grounds listed in the statute: on account of illness; if the account holder is disabled; on or after the account holder's death; or on or after the date on which the IRA holder reaches age 59½. 26 U.S.C. 72(t)(2). Contributions to IRAs and the qualified retirement plans listed in Section 522(d)(10)(E) are also tax deductible and subject to annual limits.

Only petitioners' construction can be reconciled with the purpose of Section 522(d)(10)(E). Consistent with the "fresh start" principle of federal bankruptcy law, the statute exempts plans that provide replacement income during retirement, reflecting the congressional recognition that older debtors are unlikely to have the opportunity to re-accumulate significant assets after bankruptcy. IRAs are a vital form of retirement savings, indistinguishable in that respect from traditional pensions. For example, there is no dispute that petitioners' pensions would have been exempt had they continued to work at

Northrop Grumman. Congress could not logically have intended to exempt those pensions while denying exemption to the same assets when they have merely been rolled over into IRAs.

The history of federal bankruptcy law bears out petitioners' reading of the statute. The earliest bankruptcy statutes exempted assets necessary for the debtor's future support. Over the past two centuries, Congress has consistently expanded that exemption. The statutory history belies any suggestion that the particular form in which retirement assets are held is determinative of whether the exemption applies.

Finally, there is no merit to the Third Circuit's novel rule – which the Eighth Circuit did not embrace – that the exemption of Section 522(d)(10)(E) is available only those debtors who are at least 59½ years old when they file for bankruptcy and thus can withdraw funds without penalty. The Third Circuit rested its conclusion not on the statute itself, but on a single excerpt of the legislative history that was taken out of context. The statutory text applies to the "right to receive" payments, terminology that equally encompasses future payments – *i.e.*, payments to individuals who lack a present right to receive non-penalized distributions.

That is not to say that the debtor's age is irrelevant to the exemption conferred by Section 522(d)(10)(E). The statute exempts funds only "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." The lower courts have correctly limited younger debtors' ability to invoke the exemption, recognizing that those debtors have a greater prospect of building up retirement savings after emerging from bankruptcy. But petitioners have reached retirement age, and the Eighth Circuit in this case did not doubt that their IRAs are necessary to their support. The judgment below should accordingly be reversed.

ARGUMENT

Section 522 of the Bankruptcy Code governs the exemption of property from a debtor's estate in bankruptcy. Subsection (d) governs debtors who use the exemptions provided by federal law. In particular, Subsection 522(d)(10) exempts an array of income streams, such as Social Security payments, alimony payments, and unemployment benefits.[3] The provision at issue in this case, Section 522(d)(10)(E), exempts various forms of retirement and disability savings from the debtor's estate. The statute exempts "the debtor's right to receive * * * a payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." 11 U.S.C. 522(d)(10)(E).

As the Eighth Circuit recognized, see Pet. App. 5a, this Court in *Patterson* v. *Shumate*, 504 U.S. 753 (1992), stated that IRAs qualify for exemption under Section 522(d)(10)(E). The debtor in *Patterson* participated in an employer-sponsored pension plan that contained an anti-alienation provision. This Court held that the plan was excluded from the property of the estate under Section 541(c)(2) of the Bankruptcy Code, which provides that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 504 U.S. at 757.

In reaching that conclusion, the Court in *Patterson* specifically contrasted the exclusion provided by Section

[3] States may provide their own exemptions that supplement or replace the federal provisions. See 14 COLLIER ON BANKRUPTCY ¶ 522.01 (15th ed. 2004). In states (including Arkansas) that choose not to "opt out," debtors are permitted to choose between the federal exemptions in Section 522(d) or those available under applicable state and non-bankruptcy federal law. See *ibid.* Petitioners elected to proceed under the federal exemptions. See Pet. App. 8a.

541(c)(2)'s anti-alienation rule with the exemption available under the provision at issue in this case, Section 522(d)(10)(E). Few retirement planning devices qualify under Section 541(c)(2). By contrast, this Court explained, far more plans – including IRAs – satisfy the provision at issue in this case, Section 522(d)(10)(E). Thus, although "pension plans that qualify for preferential tax treatment under 26 U.S.C. § 408 (*individual retirement accounts*) are specifically excepted from ERISA's antialienation requirement," a debtor's interest in his IRA "*nevertheless could be exempted under § 522(d)(10)(E).*" *Patterson*, 504 U.S. at 762-63 (emphasis added).

For the reasons that follow, this Court's unanimous recognition in *Patterson* that IRAs are exempt under Section 522(d)(10)(E) was correct.

I. THE EIGHTH CIRCUIT ERRED IN CONCLUDING THAT THE SECTION 522(D)(10)(E) EXEMPTIONS ARE LIMITED TO PLANS AND CONTRACTS THAT PROHIBIT EARLY WITHDRAWALS.

Notwithstanding this Court's decision in *Patterson*, the Eighth Circuit in this case held as a matter of law that IRAs do not qualify for exemption under Section 522(d)(10)(E). The court of appeals essentially agreed with *petitioners* that IRAs are indistinguishable from the retirement savings devices named in the statute: "We agree that where an individual retirement account serves as a substitute for future earnings, Congress would probably consider it a 'similar plan or contract' as those explicitly listed in § 522(d)(10)(E)." Pet. App. 5a.

But the Eighth Circuit nonetheless held that IRAs are not exempt property. Ostensibly, the court's holding was that the statutory exemption applies to some – but not all – IRAs: those that categorically prohibit early withdrawals. "[W]here debtors have unfettered discretion to withdraw from the corpus at any time subject only to modest early withdrawal tax

penalties," the court concluded, payments from an IRA "are not 'on account of age.'" See Pet. App. 6a. Although (as a judge on the Bankruptcy Appellate Panel noted) petitioners' "pensions would have been exempt had they filed their bankruptcy petition while employed by Northrop Grumman," see Pet. App. 18a, and although nothing in the language of the statute limits exemption to plans for which payments are made "only" on account of age, the Eighth Circuit denied exemption to petitioners' IRAs.

The Eighth Circuit was correct in its conclusion that an IRA is a "similar plan or contract" under the statute (see *infra* Parts II & III), but it seriously erred in its conclusion that the exemption is restricted to a subset of IRAs that prohibit early withdrawals. The subcategory of IRAs that the court of appeals reasoned would qualify for the statutory exemption simply does not exist. Neither the court of appeals, nor petitioners, nor respondent have identified *any* IRAs under which early withdrawals are prohibited. That is not surprising, for federal law expressly contemplates that the holders of IRAs will be entitled – subject to a substantial tax penalty – to make such withdrawals. See 26 U.S.C. 72(t)(1) ("If any taxpayer receives any amount from a qualified retirement plan (as defined in section 4974(c) [which includes IRAs]), the taxpayer's tax under this chapter for the taxable year in which such amount is received shall be increased by an amount equal to 10 percent of the portion of such amount which is includible in gross income."); see also *id.* § 72(t)(2)(A)(i) (excepting from penalty "[d]istributions which are * * * made on or after the date on which the employee attains age 59½"). Thus, the implausible consequence of the Eighth Circuit's holding is that, although Congress indisputably intended some IRAs to qualify for exemption under Section 522(d)(10), none actually do.

Moreover, the ability to withdraw retirement funds early – subject to a tax penalty – is common to *many* of the retirement and disability savings plans listed in Section 522(d)(10)(E). The prospect of early withdrawals thus cannot

be a feature that renders payments "not on account of age" and, as a consequence, precludes the applicability of Section 552(d)(10)(E). The same provision of the Internal Revenue Code (Section 72(t)) that addresses early withdrawals from IRAs thus applies equally to all "qualified retirement plans," 26 U.S.C. 72(t) – namely, those listed in Section 522(d)(10)(E): "(1) a plan described in section 401(a) * * *, (2) an annuity plan described in section 403(a), (3) an annuity contract described in section 403(b), (4) an individual retirement account described in section 408(a), or (5) an individual retirement annuity described in section 408(b)." 26 U.S.C. 4974(c). See generally Internal Revenue Serv., Publication 575, *at* http://www.irs.gov/publications/p575/ar02.html#d0e3742.[4] Early withdrawals from 401(k) pension plans, in particular, are common when participants change employers. See Amy B. Monahan, *Addressing the Problem of Impatients, Impulsives, and Other Imperfect Actors in 401(k) Plans*, 23 VA. TAX REV. 471, 500 & n.116 (2004) (discusing a study showing that "nearly half of workers who had a pension plan on a previous job report taking a lump-sum distribution before retirement age"). Indeed, the Eighth Circuit's analysis produces the absurd result that many of the plans Congress expressly specified were eligible for exemption under Section 522(d)(10) would not in fact be eligible.

The judgment below therefore can be sustained only if an IRA is not a "similar plan or contract" under Section 522(d)(10)(E). The Eighth Circuit itself notably did not believe that argument had merit. Indeed, the federal courts *overwhelmingly* conclude that an IRA constitutes a "similar

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[4] Early distributions from 401(k) pension plans, IRAs, and other qualified retirement plans may be permitted without tax penalty in a limited set of circumstances. See Internal Revenue Serv., Tax Topic 558, *at* http://www.irs.gov/taxtopics/tc558.html.

plan or contract."[5] For the reasons that follow, that consensus of authority is correct.

[5] See *Dettmann* v. *Brucher (In re Brucher)*, 243 F.3d 242, 242 (CA6 2001) ("The sole question presented in this appeal is whether an Individual Retirement Account (IRA) can be excluded from a bankruptcy estate * * * pursuant to 11 U.S.C. § 522(d)(10)(E). Following the reasoning of three other courts of appeals, we answer the question 'yes.'"); *Farrar* v. *McKown (In re McKown)*, 203 F.3d 1188, 1190 (CA9 2000) ("We thus hold, like our sister circuits, that an IRA qualifies from exemption under statutory language tracking 11 U.S.C. § 522(d)(10)(E)."); *Dubroff* v. *First Nat'l Bank of Glens Falls (In re Dubroff)*, 119 F.3d 75, 78-80 (CA2 1997) (holding IRAs exempt under a New York state statute "similar in all respects material to our inquiry" to Section 522(d)(10)(E)); *Carmichael* v. *Osherow (In re Carmichael)*, 100 F.3d 375, 376 & n.1 (CA5 1996) (concluding that "IRAs are exempt under [section] 522(d)(10)(E)]" with the possible exception of some unspecified "specially tailored IRAs"); *Velis* v. *Kardanis (In re Velis)*, 949 F.2d 78, 83 (CA3 1991) (denying exemption to debtor's IRA because "debtor had not shown the requisite need").

To the best of petitioners' knowledge, every bankruptcy court in the remaining circuits that has addressed the question whether IRAs can be exempt as "similar plan[s] or contract[s]" under Section 522(d)(10)(E) or a similar state exemption has concluded that they can. In the First Circuit, see, for example, *In re Marsella*, 188 B.R. 731, 732 (Bankr. D.R.I. 1995) (IRAs can be exempt under Section 522(d)(10)(E)); *In re Yee*, 147 B.R. 624, 625-26 (Bankr. D. Mass. 1992) (same); and *In re Bates*, 176 B.R. 104, 109 (Bankr. D. Me. 1994) (in applying similar state statute, finding that IRAs may be exempt under Section 522(d)(10)(E)). In the Fourth Circuit, see, for example, *In re Outen*, 220 B.R. 26, 27-31 (Bankr. D.S.C. 1998) (en banc bankruptcy court) (IRAs may be exempt under a state statute "nearly identical" to Section 522(d)(10)(E)). In the Seventh Circuit, see, for example, *American Honda Fin. Corp.* v. *Cilek (In re Cilek)*, 115 B.R. 974, 987-89 (Bankr. W.D. Wis. 1990) (IRAs may be exempt under Section 522(d)(10)(E)). In the Tenth Circuit, see, for example, *In re Garrison*, 108 B.R. 760, 768 (Bankr. N.D. Okla. 1989) (explaining that state exemption law which did not cover IRAs could be amended to include IRAs "by enacting a statute somewhat like present 11 U.S.C. § 522(d)(10)(E)"). In the Eleventh Circuit, see, for example, *In re Suarez*, 127 B.R. 73, 81 (Bankr. S.D. Fla. 1991) (IRAs may be exempt under Section 522(d)(10)(E) and related state statutes); and *Dionne* v. *Harless (In re Harless)*, 187 B.R. 719, 728 (Bankr. N.D. Ala. 1995) (noting that Section 522(d)(10)(E) "exempts payments under IRAs from the bankruptcy process"). In the D.C. Circuit, see *In re Burkette*, 279 B.R. 388, 393 (Bankr. D.D.C. 2002) (finding that IRAs may be exempt under Section 522(d)(10)(E), without directly addressing whether the tax penalty for early withdrawal of IRAs satisfies the "on account of * * * age" provision).

II. IRAS ARE "SIMILAR PLAN[S] OR CONTRACT[S]" UNDER SECTION 522(D)(10)(E).

The conclusion that IRAs are exempt under Section 522(d)(10)(E) follows from the text, purposes, and history of the statute.

A. Only Petitioners' Position Can Be Reconciled With The Text Of The Bankruptcy Code.

1. The first indication that Section 522(d)(10)(E) exempts IRAs from the bankruptcy estate is that the statute specifically incorporates the provision of the Internal Revenue Code governing IRAs. Sections 522(d)(10)(E)(i)-(iii) specify three conditions that, if each is met, will cause an otherwise valid exemption to be lost. Among these is the condition – set forth in Section 522(d)(10)(E)(iii), which uses the same "plan or contract" language as in subsection (E) – that a plan "does not qualify under section 401(a), 403(a), 403(b), *or 408* of the Internal Revenue Code of 1986" (emphasis added). Section 408 sets out the requirements for favorable tax treatment for IRAs.[6]

[6] Section 401(a) sets out the requirements for favorable tax treatment for pension, profit-sharing, and stock bonus plans. Section 403 sets out the requirements for favorable tax treatment for annuities.

The logical corollary of the exclusion from Section 522(d)(10)(E) of plans that "[do] not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code" is the *inclusion* of plans – including IRAs under Section 408 – that do so qualify. When Section 522(d)(10)(E)(iii) groups together pension, profit-sharing, and stock bonus plans, annuities, and IRAs, by referring to the Internal Revenue Code sections that define these forms of retirement savings, the message is clear: each of these forms of retirement savings is eligible for exemption from a debtor's estate. As the Ninth Circuit observed, "[t]here could be no reason for legislatures to exclude *non-qualifying* IRAs from the exemption, as the exception does, unless they intended that *qualifying* IRAs could be exempt. Indeed, there could be no reason even to mention Section 408, the IRA section, unless 'similar plan or contract' included them." *Farrar* v. *McKown*, 203 F.3d 1188, 1190 (CA9 2000) (emphasis added); accord *Dettmann* v. *Brucher*, 243 F.3d 242, 243 (CA6 2001); *Dubroff* v. *First Nat'l Bank of Glens Falls*, 119 F.3d 75, 77-78 (CA2 1997); *Carmichael* v. *Osherow*, 100 F.3d 375, 378 (CA5 1996).

2. The text of Section 522(d)(10) also elucidates a set of criteria for determining whether a particular device is sufficiently "similar" to the specific devices listed within Section 522(d)(10)(E) to qualify for exemption from the bankruptcy estate, or whether the device is instead more analogous to household goods that may be sold to satisfy creditors. The requirement of "similarity" essentially embodies the *ejusdem generis* and *noscitur a sociis* canons – *viz.*, that a word is known by the company it keeps. See, *e.g.*, *Norfolk & W. R. Co.* v. *Train Dispatchers*, 499 U.S. 117, 129 (1991). IRAs share all the relevant characteristics of the plans and contracts specifically identified by Section 522(d)(10)(E), and thus IRAs equally qualify for exemption under the statute.

Section 522(d)(10)(E) sets forth criteria for withdrawing funds. Under federal law, funds may be withdrawn from an IRA "for medical care" – that is, on account of illness, 26 U.S.C. 72(t)(2)(B); if the account holder is "disabled," *id.*

§ 72(t)(2)(A)(iii); "on or after [the account holder's] death," *id.* § 72(t)(2)(A)(ii); or "on or after the date on which the IRA holder "attains age 59½," *id.* § 72(t)(2)(A)(i). These are the same four events that entitle individuals to favorable Internal Revenue Code treatment of payments under stock bonus, pension, profit-sharing, and annuity plans. See 26 U.S.C. 72; *id.* § 401; *id.* § 403. These are also four of the five qualifications (excluding "length of service") of exempt plans listed in Section 522(d)(10)(E).

A second measure of similarity is the tax status of IRA contributions. An IRA is a tax-preferred plan, which means that contributions to IRAs are tax deductible, just like contributions to a 401(k) or other qualified retirement savings plan. Thus, the funds contributed to an IRA from present income are not taxed until they are withdrawn at a future point in time, generally during retirement.

A third measure of similarity is the restriction on contributions imposed by federal law. Like the other "defined-contribution" plans listed in Section 522(d)(10)(E) – such as stock bonus plans, profit-sharing plans, and a significant and rising number of pension plans – an IRA holder contributes a specific amount of stock or money to his account. See Jeffrey N. Gordon, *Employees, Pensions, and the New Economic Order*, 97 COLUM. L. REV. 1519, 1546-47 (1997); see also David A. Pratt, *Nor Rhyme Nor Reason: Simplifying Defined Contribution Plans*, 49 BUFF. L. REV. 741, 745 (2001) ("All defined contribution plans have the same basic purpose – the accumulation of funds for retirement * * *."). And as with other qualified plans, there are annual limits on the amount of income that can be contributed to an IRA. See Internal Revenue Serv., Traditional IRAs, *at* http://www.irs.gov/publications/p590/ch01.html#d0e1417 (IRA contribution limits); Internal Revenue Serv., Tax Topic 424 – 401(k) Plans, *at* http://www.irs.gov/taxtopics/tc424.html (limits on deferred compensation plans such as 401(k) plans).

B. Only Petitioners' Construction Can Be Reconciled With Congress's Purpose In Enacting Section 522(d)(10)(E).

1. The various plans that Congress specifically identified in Section 522(d)(10)(E) all serve a common purpose: they provide replacement income during retirement. Congress clearly understood that pension benefits typically supply the equivalent of future earnings for older persons. The legislative history explains: "Paragraph (10) exempts certain benefits that are *akin to future earnings of the debtor*. These include * * * benefits under a certain stock bonus, pension, profitsharing, annuity or similar plan." H.R. Rep. No. 95-595, at 361-62 (1977) (emphasis added). The aim of Section 522(d)(10)(E) is thus to allow exemption for plans "established for the primary purpose of providing benefits upon retirement." *Transmitting a Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 93-137, at 171-72 (1973).

Not surprisingly, Congress sought to protect older debtors' future earnings as generously as it protected a younger debtor's ability to earn wages free from the burdens of oppressive indebtedness. Congress's exemption of pensions from bankruptcy estates accordingly acknowledges the reality that benefits often take years to accumulate and that older debtors are unlikely to have the opportunity to re-accumulate the benefits essential to support them through old age.

There is no dispute that, had petitioners not been terminated from their positions with Northrop Grumman and rolled their pension assets into IRAs, those assets would have been exempt from the bankruptcy estate to the extent "reasonably necessary for [their] support." 11 U.S.C. 522(d)(10)(E). There is no reason to believe that Congress would have intended a merely nominal difference in the form of petitioners' retirement savings – a pension versus an IRA – to produce such a profound difference in the status of the asset for bankruptcy purposes. Instead, Congress would have intended persons in the position of petitioners – individuals who lost their jobs and thus are less likely to have employment income with which to sustain themselves in the future – to have at least equivalent protections under the Bankruptcy Code.

At bottom, the Eighth Circuit failed to appreciate that IRAs perform the identical role of providing replacement income in retirement. Indeed, IRAs are such a common form of retirement savings in this country that, if they do not constitute a "similar plan or contract" under Section 522(d)(10)(E), that phrase in the statute has little or no meaning.

Indeed, changes in the U.S. economy have made IRAs an increasingly important form of retirement savings. Until the late 1970s, long-term employer-employee relationships predominated, see Stephen F. Befort, *Labor and Employment Law at the Millenium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 366 (2002), and "the dominant pension form was still the defined benefit pension plan, sponsored and financed by the employer," Patricia E. Dilley, *Hidden in Plain View: The Pension Shield Against Creditors*, 74 IND. L.J. 355, 397 (1999). Today, by contrast, mobility is the norm. See John R. Keville, Note, *Retire at Your Own Risk: ERISA's Return on Investment?*, 68 ST. JOHN'S L. REV. 527, 542 (1994) ("Estimates indicate that typical American workers born after World War II will have at least ten jobs over the course of their working lives.").

As a result of these changes, fewer individuals participate in traditional defined-benefit, employer-provided pension plans. See *id.* at 534, 542-43; Bill Leonard, *Number of Employers Offering Traditional Pension Plans Continues To Dwindle*, SOC'Y FOR HUM. RESOURCE MGMT. ONLINE, Apr. 30, 2004, *at* http://www.shrm.org/hrnews_published/archives/CMS_008323.asp. Many individuals work over their careers for a series of different employers. Still other workers are self-employed for significant periods of time. As a result, more than forty percent of U.S. households now have IRAs, see Investment Co. Inst., Fundamentals: Investment Company

Institute Research in Brief 1 (2003), *available at* http://www.ici.org/shareholders/ret/fm-v12n3.pdf, and by the end of 1999 IRA assets totaled $2.5 trillion, Paul J. Graney, Cong. Res. Serv., Individual Retirement Accounts: A Fact Sheet 2, *available at* http://www.boozman.house.gov/UploadedFiles/RETIRE%20-%20Individual%20Retirement%20Accounts%20A%20Fact%20Sheet.pdf.

IRAs specifically are an important form of tax-preferred retirement savings for millions of self-employed Americans who are unable to participate in many conventional pension plans and therefore largely rely on IRAs. To exclude IRAs from the protection provided by Section 522(d)(10(E) "would be to suggest that Congress intended to penalize self-employed individuals for their choice of the form in which their retirement assets are held. This result would be antithetical to Congress' solicitude for retirement benefits for self-employed individuals." *Carmichael* v. *Osherow (In re Carmichael)*, 100 F.3d 375, 378 (CA5 1996).

For still other individuals, IRAs represent the consolidation of a series of smaller retirement savings vehicles. Workers who change jobs often amass retirement funds in several different plans, leading to an "unruly collection of qualified plan accounts." Richard L. Kaplan, *Retirement Funding and the Curious Evolution of Individual Retirement Accounts*, 7 ELDER L.J. 283, 290 (2000). As they approach retirement, "it often makes sense to bring these accounts into a single IRA to simplify account administration, coordinate distribution planning, and take advantage of economies of scale, particularly with regard to account maintenance fees." *Id.* When they change employment, workers may face the choice between preserving their retirement assets by rolling their pension funds into an IRA, or taking a taxable lump-sum distribution. See Regina T. Jefferson, *Rethinking the Risk of Defined Contribution Plans*, 4 FLA. TAX REV. 607, 627 n.82 (2000); see also Internal Revenue Serv., Publication 575, *at* http://www.irs.gov/publications/p575/ar02.html#d0e2462 (describing the tax implications of taking a lump-sum distribution). Thus, nearly half of all traditional IRAs – including petitioners' – consist at least in part of funds that have been "rolled over" from employer-sponsored retirement plans. See Investment Co. Inst., *supra,* at 9. To strip bankruptcy protection from an individual's retirement funds because they are held as IRAs would simply "create a trap for the unwary." *Carmichael*, 100 F.3d at 378. Indeed, to do so would be profoundly unjust, because third parties, rather than individual debtors, often dictate the precise form of a retirement plan.

2. The history of the legislation that created IRAs demonstrates that Congress intended the role of IRAs in providing for retirement savings to be indistinguishable from traditional employer-sponsored retirement plans. In 1974, when Congress enacted the comprehensive Employee Retirement Income Security Act (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 26 U.S.C. 410-411 and in scattered sections of Title 29), it created IRAs under Internal Revenue Code Section 408 as a new retirement savings vehicle intended to address two problems: First, many individuals were not covered under qualified employee pension plans because their employers did not offer them, but at the same time could not set up so-called Keogh (or H.R. 10) plans because they were not self-employed. See Self-Employed Individuals Tax Retirement Act of 1962, Pub. L. No. 87-792, 76 Stat. 809 (codified as amended in various sections of 26 U.S.C.); 120 CONG. REC. H8699 (1974) (statement of Rep. Erlenborn) (describing IRAs as "finally provid[ing] equity for those who are not self employed * * * and yet are not employed by an employer who furnishes them a company plan").

The creation of the IRA solved this problem by "provid[ing] deductions for a modest retirement savings set-aside for those who are not covered by any existing plans." S. Rep. No. 93-383 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890; see President Gerald Ford, Remarks and Statements by the President of the United States Upon Signing the Employee Retirement Income Security Act of 1974 (Sept. 2, 1974) (stating that one of the "seven essential parts to this

legislation * * * * [is that it] will * * * allow the one-half of American employees not covered by private pension plans to enjoy equivalent tax advantages if they set up individual retirement accounts * * *."); 120 CONG. REC. H8714 (1974) (statement of Rep. Collier) ("Both the House and Senate versions contained so-called IRA's and I think that this is one of the most critical provisions in this legislation. It is designed to allow noncovered individuals to obtain some pension benefits when they retire.").

Second, IRAs were designed to permit workers who changed jobs to bring their retirement funds with them. Before ERISA, pension funds and funds from Keogh plans often could not be moved when a worker moved from one employer to another without losing their tax-exempt status. See 2 SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUB. WELFARE, 93D CONG., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 1627 (Comm. Print 1976). By allowing employees to "roll over" funds without penalty from other tax-deferred savings plans into a single account without penalty, IRAs were seen as an important simplifying and consolidating tool for America's increasingly mobile workforce. As the Senate report accompanying ERISA explained:

> Ours is a highly mobile economy and employees frequently transfer from one job to another, particularly in their early years. As a result, employees frequently acquire vested rights to pensions under a number of different retirement plans established by previous employers. In view of the fact that some of the retirement rights will generally have been acquired many years before the employee retires, he may forget to claim all his retirement benefits. In addition, in such cases, the plans involved may not be able to locate the employee to pay him his retirement benefit. * * * [P]ermitted under certain circumstances are transfers from a qualified pension, etc., plan to an individual retirement account, a new retirement savings provision added by the bill which is explained below.

S. Rep. No. 93-383 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4915-16; see also President Gerald Ford, Remarks and Statements by the President of the United States Upon Signing the Em[illegible]yee Retirement Income Security Act of 1974 (Sept. 2, 1974) (describing as the seventh "essential part[]" of ERISA the fact that "the act will establish a limited form of portability of pension benefits by allowing workers to transfer some of their pension benefits to other plans or to their individual retirement accounts"); *Employee Retirement Income Security Act of 1974: Conference Report*, 120 CONG. REC. S15,746 (1974) (statement of Sen. Javits) ("The conference agreement expands the tax-free rollovers to permit portability between qualified plans with the individual retirement account serving as the substitute for the central portability fund of the Senate bill.").

3. Holding that IRAs and the specifically listed plans in Section 522(d)(10)(E) are exempt from the bankruptcy estate when "reasonably necessary for the support of the debtor" serves a central purpose of the bankruptcy laws: enabling debtors "to retain exempt property so that they will be able to enjoy a 'fresh start' after bankruptcy." *United States* v. *Security Indus. Bank*, 459 U.S. 70, 72 n.1 (1982). By serving as a replacement for income during retirement, IRAs provide a guarantee of financial support to retirees no longer able to earn a wage – thereby keeping the debtor from becoming "destitute and a public charge." H.R. Rep. No. 95-595, at 126 (1977).

Exemption laws, which place certain assets of the debtor beyond the reach of creditors, are an integral component of the "fresh start" principle, because they allow the debtor to retain what is necessary to get back on his feet and thus prevent the debtor from slipping back into bankruptcy. See S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5862; see also *Security Indus. Bank*, 459 U.S. at 72 n.1.

As the preeminent bankruptcy authority explains, "For most individual debtors, regardless of the chapter under which the debtor filed the petition, no section of the Bankruptcy Code is more important than section 522, which governs the debtor's rights in relation to exempt property and is crucial to the 'fresh start' envisioned by drafters of the code." 14 COLLIER ON BANKRUPTCY, at Intro.02 (15th ed. 2004).

Section 522(d)(10), in particular, embodies the "fresh start" principle. While younger debtors may have many years of gainful employment ahead of them, pension benefits and IRAs may be the only source of future income for many older persons who have lost their jobs and have little prospect of adequate re-employment because of market conditions, age, or disability. Older debtors forced into bankruptcy by unemployment may lack the skills necessary to re-enter the workforce – or, for those previously supported by a recently deceased spouse, to enter for the first time – and they often struggle to find jobs, particularly when the economy is weak. Many are hindered in their employment prospects by the same ill health, work-related disabilities, or need to stay home to care for a family member that led to bankruptcy in the first place. As a result, debtors who are either already retired or nearing retirement may be significantly dependent on the funds in their IRAs.

C. Construing Section 522(d)(10)(E) To Cover IRAs Is Consistent With The Longstanding Congressional Practice Of Exempting Pensions And Other Forms Of Future Support.

The Bankruptcy Reform Act of 1978, like all of its predecessors, explicitly exempts certain property from a debtor's estate to give the debtor a "fresh start" and a means of support. Section 522(d)(10) is thus the heir to a long line of statutory exemptions – including specifically exemptions for pension assets – that are premised on Congress's conclusion that it is essential to allow the debtor to start anew.

Each of the five bankruptcy Acts enacted in the last two centuries has recognized the debtor's right to exempt certain property from liquidation or the reach of creditors. The very first bankruptcy Act not only allowed the debtor to exempt certain personal apparel and bedding, but it also permitted him to receive a portion of the proceeds from the liquidation of his non-exempt assets and, further, "such allowance out of the bankrupt's estate * * * as [the supervising officials may deem appropriate] for the necessary support of the said bankrupt and his family." Act of Apr. 4, 1800, ch. 19, §§ 5, 34, 53, 2 Stat. 19 (repealed 1803). Similarly, the Act of 1841 provided an exemption for necessary apparel, household and kitchen furniture, and other articles of personal property, not to exceed $300 in value. Act of Aug. 19, 1841, ch. 9, § 3, 5 Stat. 440 (repealed 1843); see Francis Hilliard, *A Treatise on the Law of Bankruptcy & Insolvency* § 74, at 164 (2d ed. 1867) (discussing Act of 1841); *Williams* v. *Miller*, 16 Conn. 144 (1844) (holding that property exempt through bankruptcy was not subject to levy and that the debtor could recover for wrongful execution).

Expanding the concept considerably, the Act of 1867 allowed the debtor an exemption for all of the items listed in the Act of 1841 (with a new aggregate limit of $500), together with (1) the debtor's clothing; (2) for soldiers, the debtor's uniform, arms, and equipment; (3) property exempt from execution under federal law; and (4) subject to certain restrictions, property that the debtor could claim as exempt from levy under otherwise applicable state law. Act of Mar. 2, 1867, ch. 176, § 14, 14 Stat. 517 (repealed 1878); see *In re Beckerford*, 3 F. Cas. 26, 27 (C.C.E.D. Mo. 1870) (No. 1209) (holding that the proceeds of exempt property were also exempt and explaining that "the state, for its own purposes, and the well-being of the individual and family, has secured what are deemed necessaries, against the claims of creditors, and directed the latter to look to the other property and integrity of his debtor for security").

Subsequently, the Act of 1898 did not itself designate any specific items of property as subject to a right of exemption, but nevertheless followed the Act of 1867 in allowing the debtor to exempt property sheltered from execution under otherwise applicable state or federal law. Act of July 1, 1898, ch. 541, § 6, 30 Stat. 544, 11 U.S.C. 24, *amended by* Chandler Act, ch. 575, 52 Stat. 840 (1938) (repealed 1979). Specifically, Section 6 provided: "This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the [debtor's bankruptcy] petition." *Id.* § 6, 52 Stat. 847; see *White* v. *Stump*, 266 U.S. 310, 312-14 (1924) (discussing operation of Section 6); *Hanover Nat'l Bank* v. *Moyses*, 186 U.S. 181, 190 (1902) (upholding constitutionality of provision); 1A COLLIER ON BANKRUPTCY ¶ 6.01, at 793-96 (14th ed. 1988) (discussing section).

While the Act of 1898 was in effect, debtors either were or became entitled to exempt a variety of pensions under numerous state and federal laws. For example, as a matter of federal law, veterans' pensions were designated as exempt from the reach of creditors. See 38 U.S.C. 54, *renumbered and amended as* 38 U.S.C. 3101 (current version at 38 U.S.C. 5301); see also 45 U.S.C. 231m (railroad retirement benefit similarly exempt). Pursuant to the express provisions of Section 6 of the Act, pensions exempt under federal law were likewise exempt in bankruptcy. See, *e.g.*, *In re Bean*, 100 F. 262 (D. Vt. 1900) (pension and proceeds thereof held exempt). Similarly, myriad state laws have long exempted pensions from the reach of creditors. See, *e.g.*, *Dargan* v. *Williams*, 66 Neb. 1, 91 N.W. 862 (1902) (pension and proceeds thereof exempt under state law); *Yates County Nat'l Bank* v. *Carpenter*, 119 N.Y. 550, 23 N.E. 1108 (1890) (same); *Diamond* v. *Palmer*, 79 Iowa 578, 44 N.W. 819 (1890) (discussing pension exemption under state law).

The expansion of a debtor's right of exemption to include pensions under the Act of 1898 complemented the debtor's ability to shield his future earnings from the reach of pre-

petition creditors. Reflecting centuries-old practice, the debtor's bankruptcy filing and discharge under the Act prevented pre-petition creditors from recovering their claims against the debtor's future assets by blocking execution during the bankruptcy proceeding and discharging the debtor from personal liability. See Act of July 1, 1898, ch. 541, §§ 11, 14, 17, 30 Stat. 544 (repealed 1979); G. Eric Brunstad, Jr., *Bankruptcy and the Problems of Economic Futility: A Theory on the Unique Role of Bankruptcy Law*, 55 BUS. LAW. 499, 513-22, 571-76 (2000) (discussing the historical evolution of debtor relief provisions in U.S. bankruptcy law and the effects of insolvency on debtors); 1A COLLIER ON BANKRUPTCY ¶ 11.02, at 1141-48; ¶ 14.02, at 1261-65; ¶ 17.02, at 1581 (14th ed. 1988) (discussing Sections 11, 14 & 17 of the Act of 1898); see also Hilliard, *supra*, § 73, at 161 (commenting in 1867 on established bankruptcy practice: "[h]ence it has been held that all the acquisitions of a bankrupt, made after the filing of his petition in bankruptcy, are exempt from liability to pay debts previously contracted" (citation omitted)). As this Court remarked in 1918:

> The federal system of bankruptcy is designed not only to distribute the property of the debtor, not by law exempted, fairly and equitably among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the property which he owned at the time of bankruptcy has been administered for the benefit of creditors.

Stellwagen v. *Clum*, 245 U.S. 605, 617 (1918). The Court added a few years later: "This purpose of the act has been again and again emphasized * * * in that it gives the honest but unfortunate debtor * * * a new opportunity in life * * *. The various provisions of the Bankruptcy Act were adopted in light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act." *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244-45 (1934).

In crafting the provisions of the Bankruptcy Code to replace the Act of 1898, Congress expressly excluded from the bankruptcy estate the debtor's future earnings from personal services following the filing of the debtor's case. See 11 U.S.C. 541(a)(6). Congress likewise provided that, following the debtor's discharge, the debtor's property (including future earnings) would generally not be subject to execution to satisfy the debtor's pre-petition obligations. See 11 U.S.C. 524(a)(2)-(3) (providing that, with the exception of certain enumerated non-dischargeable debts such as alimony and child support, the discharge operates as an injunction against efforts to collect pre-petition debts from the debtor or the debtor's property); see also 11 U.S.C. 523 (prescribing exceptions to discharge).

As the foregoing reveals, the history of the debtor's exemptions and discharge is one of an expanding concept focused in tandem on the preservation of the debtor's ability to maintain at least some minimal stream of future earnings, whether through wages or income akin to wages. That history of expansion continued with the Bankruptcy Reform Act of 1978, which enacted the modern bankruptcy code. The 1978 Act broadened the available exemptions to encompass plans "established for the primary purpose of providing benefits upon retirement," H.R. Doc. 93-137, at 171-72 (1973), a description that – as the Act's history reflects – unquestionably applies to IRAs.

In 1970, Congress created the Commission on the Bankruptcy Laws of the United States "to study and recommend changes in bankruptcy laws." See H.R. Rep. No. 95-595, at 2-3 (1977). In July 1973 the Commission filed with Congress its final report, which included both a set of recommendations and a draft bill to implement those recommendations. *Id.* The Commission's proposed bill included a provision defining the exempt property of the debtor. That bill proposed exempting retirement assets as follows:

> Before or after retirement, such rights as the debtor may have under a profit sharing, pension, stock bonus, annuity, or similar plan which is established for the primary purpose of providing benefits upon retirement by reason of age, health, or length of service, and which is either (A) qualified under section 401(a) of the Internal Revenue Code, or any successor thereto, or (B) established by federal or state statute, to the extent in either case the debtor's interest therein is reasonably necessary for the support of the debtor and his dependents.

Transmitting a Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. 93-137, at 171-72 (1973).[7] Early drafts of the Bankruptcy Reform Act, however, explicitly mentioned only pension plans qualifying under 26 U.S.C. 401(a). See *Bankruptcy Reform Act: Hearing on S. 235 and S. 236 Before the Subcomm. on Improvements in Judicial Machinery, of the Senate Comm. on the Judiciary*, 94th Cong. 8 (1975) (prepared statement of the Commission on Bankruptcy Laws of the United States). This omission of other forms of retirement plans was repeatedly criticized in committee hearings as overly restrictive. See, *e.g.*, *Bankruptcy Reform Act: Hearings on S. 235 and S. 236 Before the Subcomm. on Improvements in Judicial Machinery, of the Senate Comm. on the Judiciary*, 94th Cong. 817 (1975) (statement of William T. Plumb, Jr., consultant to the Commission on the Bankruptcy Laws); *id.* at 630-31 (statement of the American Life Insurance Association). Retirement plans under Section 403 should also qualify for exemption, critics argued, as well as plans under Sections 408 and 409, which had been enacted after the bankruptcy bills were introduced in

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[7] The Commission's proposed bill was introduced in the 93rd Congress as S. 4026 and H.R. 10792, and again in the 94th Congress as S. 236 and H.R. 32. A companion bill drafted by representatives of the National Conference of Bankruptcy Judges was introduced as S. 235 and H.R. 31, and both sets of bills were sent to committee for hearings. See H.R. Rep. No. 95-595, at 2-3 (1977).

the previous session. "[I]f individually-provided retirement funds under 'H.R. 10' [section 401(c), or "Keogh" plans] are to be exempted, the exemption should surely extend to the more modest retirement arrangements dealt with in sections 408 and 409 of the code * * *." *Id.* at 817 (statement of William T. Plumb, Jr.). While debating how broadly to write the exemption, in 1975 (shortly after IRAs came into existence) the Senate subcommittee that worked on the bill asked a witness from the American Life Insurance Association (ALIA), "Why do you believe that it is more equitable to include in the proposed exemptions all pension plans qualifying under section 401, 403, 408 or 409 of the Internal Revenue Code rather than just section 401(a)?" In response, the witness testified: "Each of the tax qualified retirement plans has been recognized by Congress as a means of encouraging retirement planning. ALIA does not believe the availability of an exemption in respect of retirement income should depend on the choice or chance of the retirement benefit program." *Id.* at 679 (statement of John J. Creedon, ALIA).[8] Congress responded by passing a version of the final bill that added plans under Sections 403, 408, and 409 to the list of retirement plans named in Section 522(d)(10)(E)(iii). See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

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[8] This history confirms that the retirement plans listed in Section 522(d)(10)(E)(iii) were understood to be the "stock bonus, pension, profitsharing, annuity, or similar plan[s] or contract[s]" exempted by Section 522(d)(10)(E). The subcommittee's question regarding the equity of "includ[ing] in the proposed exemptions *all pension plans qualifying under section 401, 403, 408 or 409* of the Internal Revenue Code rather than just section 401(a)" evinces an understanding that the plans listed in Section 522(d)(10)(E)(iii) all qualify for exemption. The witness's response, too, clearly shows that what was at stake was whether plans under Sections 403, 408, or 409 would qualify for exemption. By listing all of these plans in Section 522(d)(10)(E)(iii), Congress answered in the affirmative.

III. THERE IS NO MERIT TO THE THIRD CIRCUIT'S ALTERNATIVE RULE THAT IRAS ARE EXEMPT ONLY IF THE DEBTOR HAS REACHED AGE 59½ BY THE TIME OF BANKRUPTCY.

In *Clark* v. *O'Neill (In re Clark)*, 711 F.2d 21 (1983), the Third Circuit held, contrary to the approach taken by every other court to have addressed the question, that until a debtor has reached the age of 59½ and is therefore permitted to withdraw funds without any tax penalty, he has no right to exempt the corpus of his IRA from the bankruptcy estate. (Presumably, a debtor who has reached that age can exempt both present payments and the corpus that will generate future payments necessary for his support.) According to the Third Circuit, to permit exemption for a retirement fund whose owner has not yet reached age 59½ "demonstrates a concern for the debtor's long-term security which is absent from [section 522(d)(10)(E)]." *Clark*, 711 F.2d at 23. Therefore, the court concluded, while exemption for "present payments" is permitted, exemption for "future payments" is prohibited. *Id.*

Respondent did not raise this argument below, and as noted earlier, the Eighth Circuit held precisely the opposite – that a debtor's access to his IRA is *too unlimited* to qualify for exemption.

The language and the purpose of Section 522(d)(10) establish that both present payments and the undistributed corpus should be eligible for exemption when the remaining requirements of the statute are satisfied. Specifically, the corpus should be exempt to the extent that the funds are "reasonably necessary for the support of the debtor and any dependent of the debtor."

The Third Circuit's arbitrary distinction between "present" and "future" payments should be rejected for four reasons. First, Section 522(d)(10)(E) does not simply provide for the exemption of current payments under a qualifying retirement savings device. Rather, it protects the "right to receive" such payments, a phrase that inherently contemplates

both present *and* future payment rights. See William T. Plumb, Jr., *The Recommendations of the Commission on the Bankruptcy Laws—Exempt and Immune Property*, 61 VA. L. REV. 1, 58 (1975) ("Since this proposed exemption refers to the debtor's 'rights * * * under a * * * plan,' rather than to 'payments,' 'identifiable proceeds,' or 'benefits' (as other proposed exemptions do), it apparently will not exempt any pension payments or lump sum distributions already in the hands of the debtor."); cf. *Till* v. *SCS Credit Corp.*, 124 S. Ct. 1951, 1976 (2004) (Scalia, J., dissenting) (describing, in the context of a Chapter 13 wage earner adjustment plan, the funds that a creditor will be paid in the future as "the right to receive payments"); *Legg* v. *St. John*, 296 U.S. 489, 495-96 (1936) (stating, under the 1898 Act, that the debtor's "right to receive disability benefits in the future" is "in essence an annuity" and thus "[l]ike other property, it passe[s] to the trustee, unless exempted"). Particularly because the precise timing of qualifying payments from several of the savings devices listed in Section 522(d)(10) is discretionary, it would be perverse to draw a categorical distinction on the basis of when payments are made.

By exempting the right to receive payments, as opposed to the payments themselves, the statute seeks to exempt from the estate a substitute for future earnings – income that has been earned and saved, but not yet paid. See H.R. Rep. No. 95-595, at 362 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6318 ("Paragraph (10) exempts certain benefits that are akin to future earnings of the debtor."). Just like a debtor aged 59½, a fifty-nine-year-old debtor has a right to receive payments from his IRA, even if he must wait six months to exercise it without penalty. Had Congress intended to exempt only current payments the task would have been easy enough to accomplish – by inserting the word "present," "current," or "existing" before "right." Yet the text of Section 522(d)(10)(E) demonstrates no such intention, distinguishing between debtors based *only* on their needs and without reference to age.

To be sure, Section 522(d)(10)(E) permits exemption only to the extent that the payments a debtor has the right to receive are necessary to his support. Thus, with respect to *either* present payments or the corpus from which future payments will be made, funds beyond that amount will become part of the bankruptcy estate, which the bankruptcy trustee will convert to cash and distribute to the creditors.[9]

With respect to IRAs – and indeed, with respect to *all* of the retirement savings devices covered by Section 522(d)(10)(E) – a debtor's age, physical condition, and other characteristics will affect the availability and extent of the exemption. Younger debtors, who can use current wages to support themselves and who have many years to accumulate a new retirement nest egg, may well be required to hand over their entire IRA to the trustee for distribution to their creditors. See, *e.g.*, *In re Kochell*, 732 F.2d 564, 566 (CA7 1984) (holding that a forty-four-year-old debtor's IRA was not exempt because "he could easily reestablish a retirement fund"); *In re Bowder*, 262 B.R. 919, 924 (Bankr. D. Minn. 2001) ("The Court finds that the Debtor has ample time and ability to prepare for retirement, including entirely re-funding the relatively modest IRA, and that the IRA is therefore not reasonably necessary to sustain his basic needs in retirement and not exempt."). By contrast, as noted, older debtors may lack the skills or opportunities to re-enter the workforce and accumulated further savings. Consequently, they may be eligible to keep the entire corpus. See, *e.g.*, *In re Burkette*, 279 B.R. 388, 394-95 (Bankr. D.D.C. 2002) ("The debtor's ad-

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[9] Thus, the bankruptcy laws are entirely capable of preventing debtors from using IRAs to improperly shield their assets. Moreover, in addition to limiting the amount that can be exempted to funds "necessary for the support of the debtor and any dependents," thereby making amounts beyond the level necessary for support ineligible for exemption, the general prohibition on fraudulent transfers, 11 U.S.C. 548, applies to funds deposited in IRAs as well.

vanced age is a significant factor bearing upon the court's decision."); *In re Webb*, 189 B.R. 144, 146 (Bankr. S.D. Ohio 1995) ("[I]t would take [the debtor] many years to replace the funds currently in her IRA were they turned over to the trustee in bankruptcy."); *In re Weaver*, 98 B.R. 497, 500 (Bankr. D. Neb. 1988) ("[C]ases interpreting the phrase 'reasonably necessary for the support of the debtor and any dependent of the debtor' have distinguished between younger and elderly debtors."); Plumb, *supra*, at 94 ("The period for which [a debtor's] needs must be anticipated and provided for * * * presumably is to extend at least for the remaining life expectancy of the debtor * * *.").

Second, the Third Circuit rested its decision on the legislative history of Section 522(d)(10)(E), which actually supports petitioners' construction of the statute. The Third Circuit relied principally on a quotation from the legislative history taken out of context. In reaching its anomalous result in *Clark* v. *O'Neill*, the Third Circuit seized on an isolated sentence from a House Committee Report: "The historical purpose of [] exemption laws has been to protect a debtor from his creditors, to provide him with the basic necessities of life so that even if his creditors levy on all of his nonexempt property, the debtor will not be left destitute and a public charge." *Clark*, 711 F.2d at 23 (quoting H.R. Rep. No. 95-595, at 126 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6087). On the basis of this sentence alone, the Third Circuit leapt to conclude that Section 522(d)(10)(E) only exempts "present payments" – that is, payments received by those who have already reached the statutory age (59½) at which penalty-free withdrawals are permitted. *Id.* at 23; see also *Velis* v. *Kardanis*, 949 F.2d 78, 82 (CA3 1991) (noting that "as a present entitlement," debtor's IRA was "susceptible to possible exemption under § 522(d)(10)(E)").

In fact, the portion of the Report from which this quotation was taken describes the need to *increase* the exemptions available to debtors, rather than a desire to restrict them. The full paragraph reads as follows:

> In a straight bankruptcy liquidation case, the debtor surrenders all of his nonexempt assets for sale by the trustee. The trustee then distributes the proceeds among the debtor's creditors. Under current law, what property is exempt is determined under state law. However, some state exemption laws have not been revised in this century. Most are outmoded, designed for more rural times, and hopelessly inadequate to serve the needs of and provide a fresh start for modern urban debtors. The historical purpose of these exemption laws has been to protect a debtor from his creditors, to provide him with the basic necessities of life so that even if his creditors levy on all of his nonexempt property, the debtor will not be left destitute and a public charge. The purpose has not changed, but neither have the level of exemptions in many States. Thus, the purpose has largely been defeated.

H.R. Rep. No. 95-595, at 126 (1977) (footnote omitted), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6087. The next few paragraphs note the "federal interest in seeing that a debtor that goes through bankruptcy comes out with adequate possessions to begin his fresh start," and they propose a liberal exemption scheme that permits debtors to choose between state and federal exemptions. *Id.* Thus, the portion of the Report quoted by the Third Circuit was intended to persuade legislators to make bankruptcy exemptions *more* generous, not less, and in no way evinces an intent to limit the availability of a debtor's exemptions.

Moreover, the Third Circuit ignored a much more relevant portion of the very same Report – one that contradicts its position. Describing the function of Section 522(d), the Report explains that "[p]aragraph (10) exempts certain benefits that are *akin to future earnings of the debtor*. These include * * * benefits under a certain stock bonus, pension, profitsharing, annuity or similar plan based on illness, disability, death, age, or length of service." H.R. Rep. No. 95-595, at 362 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6318 (empha-

sis added). To say that benefits falling under Section 522(d)(10) are "akin to future earnings of the debtor" is to recognize that the debtor will draw on these benefits at some later time, when they are needed for support. Just like stock bonuses, pensions, profitsharing plans, and annuities (as well as other kinds of benefits described in Section 522(d)(10), such as Social Security payments), IRAs provide a source of funds from which debtors may draw for support throughout retirement – when other sources of support, such as wages, are no longer available. This is precisely the type of future support to which Section 522(d)(10) is addressed.

Additional legislative history confirms that the exemption was intended to extend to all debtors when "reasonably necessary for * * * [their] support." The Commission on the Bankruptcy Laws of the United States, which created the report on which the Bankruptcy Reform Act of 1978 was based, see H.R. Rep. No. 95-595, at 2-3 (1977), produced the following recommendation with respect to exempt property:

> The following property * * * is also to be allowed as exempt under the proposed Act:
>
> * * *
>
> (6) *Before or after retirement*, such rights as the debtor may have under a profit sharing, pension, stock bonus, annuity, or similar plan which is established for the primary purpose of providing benefits upon retirement by reason of age, health, or length of service * * * to the extent * * * the debtor's interest therein is reasonably necessary for the support of the debtor and his dependents.

Transmitting a Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. 93-137, at 171-72 (1973) (emphasis added). The clear import of this passage is that retirement funds may be exempted whenever necessary for support, regardless whether the debtor has yet retired. Nothing in this passage – nor anything else in the legislative history of the Bankruptcy Reform Act – suggests that Congress intended to draw an arbitrary line between debtors above and below the age of 59½.

Third, the Third Circuit's rule would produce grossly inequitable – indeed, bizarre – results that Congress could not have intended: A debtor aged 59½ would be permitted to exempt as much of his IRA as is necessary for support, while a fifty-nine-year-old debtor could exempt nothing at all. But as both a practical and a theoretical matter, the value of an IRA to the two individuals is virtually identical. For both, an IRA offers a guarantee of support during retirement. For neither will it be possible to obtain that particular support from another source if the IRA is dissolved. To be sure, Congress could, if it so chooses, design a statute that treats the retirement funds of the former as categorically different from the funds of the latter, but this Court should not stretch the words of Section 522(d)(10)(E) to create a bright-line distinction when the statute declines to impose one. See FED. R. BANKR. P. 4003(c) (stating that under bankruptcy law, the trustee bears the burden of proving an exemption is unavailable to the debtor).

Petitioners' own situation demonstrates why the right to retain funds in a tax-qualified IRA should be approached on a case-by-case basis, as bankruptcy courts consistently approach a variety of questions regarding the assets that should be retained by debtors. As the court of appeals recognized, petitioners' IRAs were "established over time as part of a long-term retirement strategy" designed to support them in their old age. Pet. App. 5a. When they filed for bankruptcy, Richard Rousey was fifty-seven years old and petitioner Betty Jo Rousey was fifty-three. Their ability to replace those funds, a substantial part of which had been accumulated through their employer-sponsored pension plan and through the compounding of funds held for many years, is nonexistent. Nothing in the language, structure, or purpose of Section 522(d)(10)(E) suggests any reason why the fortuity that they filed for bankruptcy in 2001 rather than the year in

which they would be 59½ years old should determine the eligibility of their IRAs for exemption.

Fourth, even if the Third Circuit's erroneous assumption that Section 522(d)(10)(E) is unconcerned with a debtor's long-term security – an assumption based on a lone sentence taken out of context from the legislative history – were correct, petitioners should still be permitted to exempt their IRAs. For debtors, such as petitioners, who are on the verge of retirement, without sufficient time to re-create a retirement nest-egg from scratch, the retention of an IRA is very much a matter of present support. As one court observed, rebutting the Third Circuit's interpretation of Section 522(d)(10)(E), "characterizing asset accumulation for retirement as a matter of 'long term security[]' ignores the reality that, in most instances, individuals must save throughout their working years in order to have funds available for their retirement needs. Providing for 'long term security' is, in every sense, an individual's present (and continuing) concern." *In re Bates*, 176 B.R. 104, 109 (Bankr. D. Me. 1994) (citation omitted). To pretend that a debtor just shy of retirement has no present need to retain his retirement savings is to close one's eyes to the obvious. It may well force an older debtor into beggaring himself today in order to save even a pittance for tomorrow. The perverse result of the Third Circuit's rule is to encourage individuals to remain insolvent until age 59½ rather than entering into a prompt and economically efficient reorganization.

Taken to its logical conclusion, the Third Circuit's claim that Section 522(d)(10)(E) was intended only "to alleviate present rather than long-term need," *Clark*, 711 F.2d at 23, suggests that even when a debtor is over the age of 59½ – and thus eligible to receive the "present payments," as the Third Circuit claims is necessary to qualify for exemption – a bankruptcy court may not consider the debtor's long-term needs in determining whether to exempt his retirement funds. If retirement security were truly a "long-term need," as the Third Circuit maintains in *Clark*, then the ability to save for retirement should be irrelevant to the exemption decision whether or not the debtor is above the age of 59½. In other words, only the debtor's needs at the very moment of bankruptcy, without regard to his ability to amass a new retirement fund or support himself in the future, should determine the exemption's availability.

However, even courts purporting to apply the Third Circuit's distinction between present and future payments invariably look at the debtor's long-term financial outlook – including his prospects for amassing a new retirement nest-egg – when determining whether to exempt his retirement funds. See, *e.g.*, *In re Comp*, 134 B.R. 544, 554-55 (Bankr. M.D. Pa. 1991) (discussing the "age of the debtor" and his "ability to save for retirement" as considerations bearing on whether he qualified for exemption under Section 522(d)(10)(E)); *In re Velis*, 123 B.R. 497 (D.N.J. 1991) (same); see also *Reitmeyer* v. *Gralka (In re Gralka)*, 204 B.R. 184, 190 (Bankr. W.D. Pa. 1997) (if debtor were over age 59½, his "age" and "ability to save for retirement" would bear on the exemption decision). While inconsistent with *Clark*, this trend is unsurprising, because one would hardly expect courts to strip an older debtor of his retirement funds, leaving him with just enough to subsist for the time-being even if he is unable to work. Yet that is precisely what the Third Circuit's rule does to a debtor under the age of 59½, regardless of his age or proximity to retirement, his employment status, his health, or even his need.

Noting the absurdity of this result, a bankruptcy court in the Third Circuit refused to deny exemption to a fifty-six-year-old debtor's IRA merely because he was just shy of age 59½, instead drawing the line at age fifty-five.[10] *Pineo* v.

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[10] The court chose the age of 55 using the following reasoning:

> The Court borrows from I.R.C. § 72(t)(2)(A)(v) to arrive at age 55 as the precise age at which a debtor shall be deemed to have a sufficiently present right to receive payment from his or her IRA because (a) I.R.C.

Fulton (In re Fulton), 240 B.R. 854, 875-76 (Bankr. W.D. Pa. 1999). The court reasoned that "if the Court were to conclude otherwise and disallow *per se* an exemption of such funds to a bankruptcy debtor who has already reached age 55, then said debtor, given the urgency for retirement savings when one attains the age of 55, would be forced to allocate from his or her wages, *which wages would otherwise be utilized for his or her present needs*, an amount to at least partially replenish the IRA funds seized in bankruptcy." *Id.* at 875-76 (emphasis in original). The bankruptcy court correctly recognized that retirement support is not only a matter of concern to those over the age of 59½; but neither is it of concern only to those over fifty-five. Rather than draw an arbitrary line at age fifty-five (or any other age), this Court should permit exemption for the retirement funds of a debtor whenever "necessary for support." Common sense – and the plain language of Section 522(d)(10)(E) – dictate as much.

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§ 72(t)(2)(A)(v) operates to except from penalty taxation distributions from plans other than IRAs if a plan beneficiary has reached age 55, and (b) even though I.R.C. § 72(t)(2)(A)(v) does not so apply to except from penalty taxation distributions from an IRA, the Court detects neither reason nor necessity for discriminating, *within the bankruptcy context*, against beneficiaries of IRAs after said beneficiaries have reached, and have also abstained from withdrawing funds from said plans prior to reaching, age 55.

240 B.R. at 876 (emphasis in original).

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Eighth Circuit should be reversed.

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August 20, 2004

(6)

No. 03-1407

IN THE

Supreme Court of the United States

RICHARD GERALD ROUSEY AND BETTY JO ROUSEY,
Petitioners,

v.

JILL R. JACOWAY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a debtor's right to receive payment from an individual retirement account—when the account is structured to permit the debtor to withdraw funds from the account at any time and for any reason, subject only to a minor penalty—is exempt from the reach of creditors in bankruptcy under 11 U.S.C. § 522(d)(10)(E) on the grounds that the account is "similar" to a "stock bonus, pension, profit-sharing [or] annuity" plan and that the right to payment is "on account of illness, disability, death, age, or length of service."

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IN THE

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RICHARD GERALD ROUSEY AND BETTY JO ROUSEY,
Petitioners,

v.

JILL R. JACOWAY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

STATUTORY BACKGROUND

1. Outside of bankruptcy, the rights of creditors to reduce their claims against a debtor to judgment, and to execute a judgment against a debtor's assets, are governed by state law. Accordingly, state law typically determines the means by which a creditor is permitted to enforce a debt, and prescribes which assets are exempt from the reach of creditors. *See, e.g., Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974) (rejecting due process challenge to Louisiana procedure for sequestering personal property); *James* v. *Strange*, 407 U.S. 128, 135 (1972) (describing Kansas exemptions for

"furnishings, food, fuel, clothing, means of transportation, pension funds, and . . . a family burial plot or crypt").

Federal law, of course, may preempt state law on debtor-creditor relations. To that end, for example, the Tax Code expressly grants the Internal Revenue Service the authority to levy against assets that may otherwise be exempt under state law. *See* 26 U.S.C. §§ 6331, 6334; *United States* v. *Mitchell*, 403 U.S. 190, 205 (1971) ("state law which exempts a husband's interest in community property from his premarital debts does not defeat collection of his federal income tax liability for premarital tax years from his interest in the community [property]"). Similarly, in *Guidry* v. *Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990), this Court held that certain ERISA pension benefits were not subject to garnishment by creditors—even victims of embezzlement—on account of statutory language providing that "benefits provided under the [ERISA] plan[s] may not be assigned or alienated." 29 U.S.C. § 1056(d)(1).

2. Prior to the 1978 enactment of the Bankruptcy Code, a debtor's right to exempt property remained a matter of non-bankruptcy law (typically state law), even in bankruptcy. *See* Bankruptcy Act of 1898, § 6 (1898); David A. Skeel, *Debt's Dominion: A History of Bankruptcy Law in America* 151 (2001) ("In the debates leading up to the 1898 act, lawmakers had taken as a given that state lawmakers would be the ones to determine how much property debtors could exempt.").

The 1978 Bankruptcy Code, however, created a "cooperative federalism" scheme of exemption law. Specifically, Section 522 of the Bankruptcy Code permits a debtor to choose between a set of federal exemptions set forth in the Bankruptcy Code and the state law exemptions of the state in which the debtor is domiciled. *See* 11 U.S.C. § 522(b)(2). In addition, the Bankruptcy Code authorizes states to "opt out" of the federal exemption scheme, in which case debtors

are limited to those exemptions available under state law. *See* 11 U.S.C. § 522(b)(1).[1]

3. The question of which property is exempt from the reach of creditors is critical in a chapter 7 bankruptcy. A chapter 7 bankruptcy is intended to rationalize the process whereby various creditors assert claims against a debtor's assets. If a debtor is unable to pay his or her debts in full, chapter 7 avoids the race to the courthouse that results in the debtor's assets going to the first creditor able to execute on a judgment. Rather, a trustee is appointed under the Bankruptcy Code and is charged with the responsibility for liquidating the debtor's assets and distributing them to creditors *pro rata*, in accordance with a statutory priority scheme. *See* 11 U.S.C. §§ 704, 726.

Section 541 of the Bankruptcy Code provides that all of the debtor's interests in property as of the filing of the bankruptcy case become "property of the estate." *See* 11 U.S.C. § 541(a)(1) (debtor's estate includes nearly "all legal and equitable interests of the debtor in property as of the commencement of the case").[2] This "estate" is administered by the trustee, who is charged with liquidating the property and distributing it to creditors. At the conclusion of a chapter 7 bankruptcy, a debtor will typically receive a discharge of all prepetition debt. *See id.* § 727. The discharge provides the debtor with a "fresh start"—the ability to move forward unencumbered by debt that was incurred prior to the bankruptcy, and to earn (and keep) future income without paying

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[1] The debtors in this case are Arkansas residents. Arkansas "opted in" to the federal exemptions. *See* Ark. Code Ann. § 16-66-217. The debtors were therefore permitted to choose between exempting the property set out in Section 522(d) of the Bankruptcy Code or electing the exemptions provided under Arkansas law.

[2] A chapter 7 bankruptcy debtor is required to disclose upon the appropriate schedules all property which the debtor owns or in which he has an ownership interest. Fed. R. Bankr. P. 1007(b)(1).

that prepetition debt. But this discharge comes at a price. Specifically, in exchange for this "fresh start," a debtor is required to turn over all of his nonexempt property to the trustee. *See Ohio* v. *Kovacs*, 469 U.S. 274, 284 n.12 (1985) (explaining the role of a trustee in a chapter 7 bankruptcy, including the responsibility to collect and distribute to creditors the debtor's nonexempt property).

4. The exemptions contained in Section 522(d) of the Bankruptcy Code, like the exemptions that typically exist under state law, are intended to provide the debtor with basic necessities and to effectuate a "fresh start" by making it possible for the debtor to earn future income. *See United States* v. *Security Indus. Bank*, 459 U.S. 70, 83 (1982) (Blackmun, J., concurring) ("Section 522 . . . [like] all similar statutes, was enacted to protect the debtor's essential needs and to enable him to have a fresh start economically.").

To that end, Section 522(d) provides exemptions for, among other things: the debtor's interest, up to $18,450 in value, in real or personal property used as a residence, *see* 11 U.S.C. § 522(d)(1); the debtor's interest, not to exceed $2,950 in value, in a motor vehicle, *see id.* § 522(d)(2); and the debtor's interest, not to exceed $1,225 in value, in jewelry, *see id.* § 522(d)(4). In addition, the so-called "wild card" exemption of Section 522(d)(5) permits the exemption of the debtor's interest in any property up to $975, plus up to $9,250 of any unused amount of the exemption for a residence provided in Section 522(d)(1). *See id.* § 522(d)(5).

5. The specific exemption at issue herein is set forth at Section 522(d)(10)(E). That section provides that a debtor may exempt his:

> right to receive—
>
> * * * *
>
> (E) a payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless—
>
> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
>
> (ii) such payment is on account of age or length of service; and
>
> (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

11 U.S.C. § 522(d)(10)(E).

6. In addition to the "exemptions" provided in Section 522, other property is "excluded" from the bankruptcy estate under Section 541 of the Bankruptcy Code. For example, property in which the debtor holds bare legal title in trust for a third party is excluded from the bankruptcy estate under Section 541. *See United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 204 n.8 (1983) ("Congress intended to exclude from the estate property of others in which the debtor had some minor interest such as a lien or bare legal title"); *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 213 (2002) (noting that "in the eyes of equity" the beneficiary of a constructive trust is "the true owner").

Property in a trust that cannot be alienated—or transferred to any third person—under applicable law is also excluded from the bankruptcy estate. *See* 11 U.S.C. § 541(c)(2). For this reason, this Court held in *Patterson* v. *Shumate*, 504 U.S. 753 (1992), that a debtor's interest in a pension plan established pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA") was not property of the debtor's estate in bankruptcy. Because ERISA requires that "benefits provided under the plan may not be assigned or alienated," 29 U.S.C. § 1056(d)(1), and because the Bankruptcy Code states that a "restriction on the transfer of a beneficial interest of the debtor in a trust that is en-

forceable under applicable nonbankruptcy law is enforceable in a case under this title," 11 U.S.C. § 541(c)(2), the *Patterson* Court concluded that the "antialienation provision required for ERISA qualification . . . constitutes an enforceable transfer restriction for purposes of § 541(c)(2)'s exclusion of property from the bankruptcy estate." 504 U.S. at 760. Following *Patterson*, lower courts have uniformly held that ERISA-qualified plans are excluded from the debtor's bankruptcy estate.[3]

7. Individual Retirement Accounts, or "IRAs," were originally introduced by ERISA as part of a broad reform of the nation's private pension system. *See* Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 2002, 88 Stat. 829, 958-966 (codified as amended at 26 U.S.C. § 219, 408 (2000)).[4]

IRAs were originally intended to "offer a tax incentive to encourage individuals who [did] not participate in retirement plans to set aside a portion of their current income for retirement savings." 119 Cong. Rec. 28,652 (1973) (statement of Sen. Bentsen, the sponsor of S. 1179). From their

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[3] *See, e.g., In re Sewell*, 180 F.3d 707, 712-713 (5th Cir. 1999); *Harshbarger* v. *Pees (In re Harshbarger)*, 66 F.3d 775, 777 (6th Cir. 1995); *Iannacone* v. *Northern States Power Co. (In re Conlan)*, 974 F.2d 88, 89 (8th Cir. 1992); *Manufacturers Bank & Trust Co.* v. *Holst*, 197 B.R. 856, 859 (N.D. Iowa 1996); *In re Bennett*, 185 B.R. 4, 6 (Bankr. E.D.N.Y. 1995); *In re Hanes*, 162 B.R. 733, 738 (Bankr. E.D. Va. 1994).

[4] When IRAs were introduced, defined benefits plans dominated the pension landscape in the United States. *See* Susan J. Stabile, *Paternalism Isn't Always a Dirty Word: Can the Law Better Protect Defined Contribution Plan Participants?*, 5 Employees Rts. & Emp. Pol'y J. 491, 492 (2001). A traditional defined benefits plan requires an employer (or trust) to pay an employee upon retirement a predetermined amount (or an amount according to a predetermined formula). *See id.* at 494-495. Under the other form of pension plan, a defined contribution plan, much less common at the time, an employer or employee makes contributions to the plan on behalf of the employee, who is entitled to receive the value of the account upon retirement. *See id.*

creation in 1974, however, IRAs differed from traditional pension plans in one very important respect—IRAs permitted unrestricted access to the savings they contained prior to retirement, while traditional pension plans did not. *See, e.g.*, Patricia E. Dilley, *Hidden in Plain View: The Pension Shield Against Creditors*, 74 Ind. L.J. 355, 418 (1999).

IRAs come in many forms, including: (1) individual retirement accounts qualifying under 26 U.S.C. § 408(a) (referred to herein as "standard IRAs" or "408(a) IRAs"); (2) individual retirement annuities qualifying under 26 U.S.C. § 408(b) purchased from an insurance company; (3) employer-sponsored IRAs qualifying under 26 U.S.C. § 408(c) (which may be established under either 26 U.S.C. § 408(a) or § 408(b)); (4) Simplified Employee Pension IRAs qualifying under 26 U.S.C. § 408(k); and (5) many relatively newer forms of IRAs including SIMPLE IRAs, Deemed IRAs, Roth IRAs, Educational IRAs. *See* 26 U.S.C. §§ 408(p), 408(q), 408A, 530.

A standard IRA is the most common form of IRA (and the form of IRA at issue herein). A standard IRA may be established at almost any bank or financial institution by an individual opening an account that meets certain requirements. An individual may deposit up to $3,000 (for 2004) per year in cash into such an account, or, as in this case, "roll over" funds from a qualified pension plan after termination from prior employment.

Unlike traditional pension plans, the individual maintains complete control over a standard IRA, including the ability to withdraw some or all of the account proceeds at any time, for any reason, subject only to a 10 percent tax penalty. The ability to access any or all funds in a standard IRA at any time is the hallmark that makes standard IRAs different from traditional pension plans:

> The qualified plan requirements of the Code . . . require behavior from employees—essentially deferral of compensation until retirement—that individ-

> ual employees might not choose to engage in if given the choice. IRAs, on the other hand, are established, contributed to, and maintained almost solely at the discretion of the individual. The choice to immediately consume all or a part of the amounts held in the IRA, rather than waiting for retirement, involves a monetary penalty but no disqualification of the trust [as with qualified plans].

Dilley, *supra*, 74 Ind. L.J. at 429.[5] In addition, unlike traditional pension plans, IRAs allow funds to be withdrawn without any tax penalty for the purchase of a first home, 26 U.S.C. § 72(t)(2)(F), for medical care insurance premiums, *id.* § 72(t)(2)(D), and for qualified higher education expenses, *id.* § 72(t)(2)(E). For all these reasons, IRAs have become a tool to stimulate savings in many forms, rather than just retirement savings. *See* Richard L. Kaplan, *Retirement Funding and the Curious Evolutions of Individual Retirement Accounts*, 7 Elder L.J. 283, 285 (1999) (IRAs "have transmogrified . . . into all-purpose investment kitties that can be used for purposes that have little connection to the holder's retirement").

STATEMENT OF THE CASE

1. Richard Gerald Rousey and Betty Jo Rousey filed their joint chapter 7 bankruptcy petition, with accompanying schedules and statements, in the United States Bankruptcy Court for the Western District of Arkansas on April 27, 2001. Pet. App. 20a. On the date of filing, Jill R. Jacoway was appointed by the bankruptcy court to serve as the chapter 7 trustee in the case. *Id.* at 8a.

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[5] *See also* Treas. Reg. § 1.401-1(a)(2)(i), 1.401-1(b)(1)(i), 1.401-1(b)(1)(ii), 1.401-1(b)(1)(iii) (providing that pension, profit-sharing, and stock bonus plans should be based on providing income upon or after retirement).

The Rouseys disclosed in their schedules that they had ownership interests in two IRAs. Pet. App. 20a. As of the date of the bankruptcy filing, each of the Rouseys owned an IRA on deposit with the First National Bank of Berryville, Arkansas. Richard Gerald Rousey's Individual Retirement Account Certificate of Deposit No. 208221 had a value of $42,915.32. *Id.* Betty Jo Rousey's Individual Retirement Account Certificate of Deposit No. 208345 had a value of $12,118.16. *Id.*

The Rouseys claimed these accounts as exempt, listing the accounts on "Schedule C - Property Claimed as Exempt." Pet. App. 20a. Richard Gerald Rousey exempted $5,033.00 of the value of his IRA under the "wildcard exemption," 11 U.S.C. § 522(d)(5), and claimed the remaining $37,882.32 as exempt pursuant to Section 522(d)(10)(E). Betty Jo Rousey exempted $5,648.00 of the value of her IRA pursuant to Section 522(d)(5), and claimed the remaining amount of $6,470.10 as exempt under Section 522(d)(10)(E). *See id.*

On August 3, 2001, the trustee filed an objection to the Rouseys' claims of exemption, and moved the bankruptcy court to direct the debtors to turn over to the trustee that portion of the IRAs that they claimed as exempt pursuant to Section 522(d)(10)(E). *See* Pet. App. 20a.[6] By order dated February 13, 2002, the bankruptcy court granted the trustee's motion. *See id.* at 35a.

The bankruptcy court held that Section 522(d)(10)(E) required that the petitioners' IRAs must be "similar plans or contracts" to "a stock bonus, pension, profitsharing, [or] annuity" plan, and that the debtors' rights of payment must be "on account of illness, disability, death, age, or length of service" to qualify for the exemption. "If any of the conditions

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[6] The Trustee's objection was not addressed to amounts the Rouseys claimed as exempt under Section 522(d)(5). *Id.* at 21a.

of the exemption are not met, Debtors may not claim the exemption." Pet. App. 26a. The court held that the Rouseys' IRAs did not qualify as "similar plans or contracts" within the meaning of the statute and that the Rouseys' ability to withdraw funds from the accounts at their discretion rendered their right to payment from the IRAs not "on account of illness, disability, death, age, or length of service." *Id.* at 34a-35a.

2. The Bankruptcy Appellate Panel for the Eighth Circuit Court of Appeals affirmed the bankruptcy court. Pet. App. 17a. The court acknowledged that the Rouseys' IRAs were initially funded by a rollover from a former employer's pension plan. The court nevertheless concluded that because the Rouseys could access the funds in the account at any time, for any reason, subject only to a tax penalty, the IRAs were not "similar" to pensions or annuities, which serve as "wage substitutes after retirement." *Id.* at 11a. Further, the Rouseys' "unfettered discretion" to withdraw the funds from the IRAs meant that their right to payment from the accounts was not "on account of illness, disability, death, age, or length of service." *Id.* at 17a. In denying the Rouseys' claim of exemption, the court reasoned that Section 522(d)(10)(E) does not create a rule that IRAs are "per se" ineligible for the exemption. Rather, the plain language of the statute requires only that the debtor's accounts "meet the requirements under 11 U.S.C. § 522(d)(10)(E) in order for IRA funds to be exempt under that provision." *Id.* at 16a. Accordingly, whenever a trustee challenges a claim of exemption in an IRA, the bankruptcy court is required to examine the nature of the debtor's right to payment from the particular account and determine whether the statutory requirements are satisfied.

3. The United States Court of Appeals for the Eighth Circuit unanimously affirmed the judgment of the Bankruptcy Appellate Panel. Pet. App. at 6a. The Court of Appeals found that the express reference to Section 408 of the Internal Revenue Code in Section 522(d)(10)(E) suggests

that "Congress probably intended some IRAs" to be exempt, but noted that if Congress intended to exempt all IRAs, "it would have been a very easy legislative task to have affirmatively accomplished." *Id.* at 5a-6a. Because petitioners' IRAs were like "readily accessible savings accounts of which the debtors may easily avail themselves (albeit with some discouraging tax consequences) at any time for any purpose," their rights to payment were not "triggered by illness, disability, death, age, or length of service," and therefore did not qualify for exemption. *Id.* at 6a. The petitioners timely requested a rehearing en banc, which was denied. *Id.* at 36a. This Court granted certiorari. ___ U.S. ___, 124 S. Ct. 2817 (2004).

SUMMARY OF ARGUMENT

The statutory questions presented by this case are: (a) whether the Rouseys' "right to receive . . . a payment" from their IRAs is "on account of illness, disability, death, age, or length of service," and (b) whether their IRAs are "similar" to a "stock bonus, pension, profitsharing, [or] annuity" plan.

First, the Rouseys' "right to receive . . . a payment" from their IRAs is not "on account of" their age or any of the other specified factors. Rather, they are entitled to withdraw every dollar that is in their IRAs at any time, for any reason. While it is true that the Rouseys would be required to pay a tax penalty if they withdrew from their IRAs prior to reaching the age of 59½, or if they were not buying a first home or paying medical care insurance premiums or college expenses, *see* 26 U.S.C. § 72(t)(2)(A)(i), 72(t)(2)(D)-(F), their right to withdraw funds from their IRAs is not linked to their age.

Rather, the very most that can be said to be "on account of" the Rouseys' age is their right to avoid the tax penalty. But because the statutory language focuses on their "right to receive . . . a payment"—and because it is not disputed

that the Rouseys enjoy (and have enjoyed) such a right without regard to their age—the plain language of the statute compels the conclusion that the Rouseys' rights in connection with their IRAs are not exempt from the reach of creditors.

Second, for related reasons, the Rouseys' IRAs are not "similar" to the plans or contracts identified in the statute. The hallmark of each of those plans is that the beneficiary of such a plan is denied unrestricted access to those funds prior to a specific triggering event. For this reason, an individual's "right to receive . . . a payment" under such a plan will necessarily serve as a form of replacement income. Standard IRAs, however, operate more like savings accounts. Like any savings account, the corpus of those funds is accessible at any time. And while it is true that Congress (or an individual debtor) may intend that those savings be used to pay for retirement, that intention alone is insufficient to put those funds outside the reach of creditors in bankruptcy. While saving for retirement is surely a laudable goal, an individual is not permitted to keep his or her retirement savings—while creditors go unpaid—and at the same time maintain the right to access those funds at any time and for any reason. Because a standard IRA operates more like a savings account than it does like a traditional pension plan, it is not "similar" to the types of pension plans specified in Section 522(d)(10)(E).

Third, the Rouseys are incorrect in arguing that requiring that their "right to receive . . . a payment" from their IRAs in fact be "on account of age" would render the "unless" clause of Section 522(d)(10)(E) superfluous. It is certainly true that the "unless" clause's express reference to Section 408 of the Internal Revenue Code carries an inference that *some* IRAs may fit within the statutory exemption. But it by no means implies that *all* rights to payment from IRAs must be exempt.

Indeed, there are a variety of different types of IRAs authorized by Section 408. Individuals and their banks or financial institutions may structure an IRA so that the right to payment from such account is on account of age, or they may structure it (as here) so that the individual has an unrestricted right to access the funds at any time. Because the Rouseys chose to open IRAs that permitted them access to the corpus of the accounts at any time, it is neither surprising nor unfair that such funds—like other savings—will be reachable by creditors in bankruptcy.

Finally, it is significant that under federal non-bankruptcy law, and under state law as it existed at the time that Section 522(d)(10)(E) was enacted, IRAs were generally not exempt from the reach of creditors. In view of the deference that the exemption scheme of Section 522 demonstrates to state law rights, it would be surprising to ascribe to Congress an unspoken intent to take assets that were otherwise reachable by creditors outside of bankruptcy and render them exempt in bankruptcy.

ARGUMENT

I. THE ROUSEYS DO NOT HAVE A "RIGHT TO RECEIVE A PAYMENT" "ON ACCOUNT OF ILLNESS, DISABILITY, DEATH, AGE, OR LENGTH OF SERVICE."

Section 522(d)(10)(E) permits the debtor to exempt a "right to receive . . . a payment under a [qualifying retirement plan] *on account of illness, disability, death, age, or length of service*." 11 U.S.C. § 522(d)(10)(E) (emphasis added). Because the Rouseys are free to withdraw funds from their IRAs at any time, for any reason or no reason, their "right to receive a payment" from their IRAs is not "on account of . . . age."

The plain meaning of the term "on account of" necessarily requires a causal nexus between the "right to receive a payment" and one of the circumstances that the statute identifies. Put simply, to say that the debtor's "right to re-

ceive a payment" is "on account of age" means, in ordinary English, that the debtor is to receive a payment *because of* the debtor's age.

But in the case of a standard IRA, the debtor is entitled to withdraw funds from that account—that is, the debtor has a "right to receive a payment" from that account—without regard to the debtor's age or any of the other specified statutory circumstances. The Rouseys' IRAs permit such unrestricted access to the funds in the accounts, subject only to a 10 percent tax penalty. The right to payment from the Rouseys' accounts thus exists without regard to their health, disability status, mortality, or age.

To be sure, once the Rouseys reach age 59½, they may withdraw funds from their IRAs without tax penalty (as they may also do in order to purchase a house or pay for college or medical insurance premiums). *See* 26 U.S.C. § 72(t). But it is only the Rouseys' ability to avoid that tax penalty—and *not* their underlying right to payment—that is in any sense attributable to their age. Since the Rouseys' right to payment from their IRAs bears no relationship to their age or any of the other statutory factors, it is not exempt within the meaning of Section 522(d)(10)(E).

The Rouseys hardly even attempt to argue that the "on account of age" requirement is satisfied here. Rather, they would read that plain requirement out of the statute altogether, on the ground that reading the statute to mean what it says—that a right to receive a payment is exempt only if it arises "on account of" the debtor's age (or another specified factor)—would disqualify rights to payment under retirement plans other than IRAs from exemption. Pet. Br. 10-11. *But see Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992) (Congress "says in a statute what it means and means in a statute what it says there"); *see also United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (in interpreting Bankruptcy Code, observing that "where . . . the statute's language is plain, the sole function of the courts

is to enforce it according to its terms") (internal quotation marks omitted).

But, in any event, the premise of the Rouseys' argument—that the other types of pension plans mentioned in Section 522(d)(10)(E) are similar to IRAs in permitting withdrawals for reasons other than retirement—is incorrect. Enforcing the "on account of" requirement according to its terms therefore would not have the dire consequences that the Rouseys suggest. The trademark characteristic of a traditional pension plan is that it pays upon reaching retirement age. *See* Treas. Reg. § 1.401-1(a)(2)(i), 1.401-1(b)(1)(i), 1.401-1(b)(1)(ii), 1.401-1(b)(1)(iii) (providing that pension, profit-sharing and stock bonus plans should be based on providing income upon or after retirement). IRAs, unlike any of the other plans listed in the statute, permit the holder to have unrestricted access to the funds for any reason at all, subject only to a 10 percent tax penalty. It is certainly true that the other plans may permit withdrawals in certain specific circumstances that do not turn on age. But none of those plans provides a debtor with complete unfettered access to all of the funds at any time.[7] A right to receive a payment from a traditional pension plan may therefore arise "on account of age"—even if it may also in certain specific circumstances arise "on account of" other factors—whereas the Rouseys' right to payment from their IRAs exists without regard to any specific triggering factor, and therefore cannot be said to be "on account of" age.

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[7] The Rouseys contend that the "same provision of the Internal Revenue Code (Section 72(t)) that addresses early withdrawals from IRAs . . . applies equally to all 'qualified retirement plans'." *See* Pet. Br. 11. That is incorrect. In fact, that section of the Internal Revenue Code permits early withdrawals without tax penalty that are unique to IRAs—including for buying a first home, for health care insurance premiums, or for education. *See* 26 U.S.C. § 72(t)(2)(D)-(F). The more relevant point, however, is that only IRAs permit the account holder to withdraw funds at any time and for any reason.

A. This Court Has Already Held That The Term "On Account Of," As Used In Section 522(d)(10)(E), Means "Because Of."

That "on account of" means "because of" is well settled. Indeed, this Court previously pointed to the very use of the "on account of" language in Section 522(d)(10)(E) in holding that this term, when used in the Bankruptcy Code, carries the "common understanding" of the term, meaning "because of." *See Bank of Am. Nat'l Trust & Sav. Ass'n* v. *203 North LaSalle St. P'ship*, 526 U.S. 434, 450-454 (1999).

203 North LaSalle involved what is known as bankruptcy's "absolute priority rule," which prevents a junior class of creditors or shareholders from being paid on its claims unless the senior class either consents to its treatment or is paid in full. Specifically, the Bankruptcy Code states that a chapter 11 plan of reorganization must provide that "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan *on account of* such junior claim or interest any property" unless it consents or is paid in full. 11 U.S.C. § 1129(b)(2)(B)(ii) (emphasis added). In other words, the absolute priority rule "bars a junior interest holder's receipt of any property on account of his prior interest." *203 North LaSalle*, 526 U.S. at 437.

The question in *203 North LaSalle* was whether the absolute priority rule was violated by a plan that gave prior equity holders (and no one else) the right to purchase an equity interest in the reorganized debtor. In support of the view that such a plan complied with the statute, the prior equity holders contended that "on account of" meant "in exchange for." Accordingly, the equity holders argued, so long as they were providing new consideration for the equity of the reorganized debtor, they were not receiving the stock "on account of" their prior equity position. Rather, their new interest in the reorganized debtor was provided "on account of" the new payment they were making.

This Court rejected that position, holding that so long as there is a causal connection between the old interest and the distribution of value under the plan, that distribution is "on account of" the prior interest, and thus in violation of Section 1129(b)(2)'s absolute priority rule. If the prior equity holders were receiving an opportunity to purchase shares of the reorganized debtor that was not available to others, their new interest was, at least in part, "on account of" their prior equity interest.

In so holding, the Court noted that the Bankruptcy Code used the term "on account of" five different times, including the instance that is at issue here in Section 522(d)(10)(E). Each of those uses, the Court held, supported the view that the term should have a meaning consistent with "the more common understanding . . .'because of'." *Id.* at 451.

The foundation of the argument advanced by the Rouseys and their *amicus* is that the factors listed in Section 522(d)(10)(E) are non-exclusive. They contend that the court of appeals was wrong to hold that the right to payment must be "on account of" age, or another statutory factor, and *only* on account of those factors. *See* Pet. Br. 10; Amicus Br. 20-24. But that answers the wrong question. The Rouseys' right to payment from their IRAs does not arise on account of age *and* on account of another factor. Rather, an individual's right to withdraw from a standard IRA does not arise "on account of age" at all. It is the right to avoid a tax penalty—not the right to receive payment from the account—that arises on account of age (and other factors).

B. Outside Of The Bankruptcy Code, This Court Has Held That "On Account Of" Requires A Strong "Causal Connection."

In other contexts, this Court has made clear that the term "on account of" requires a "strong[] causal connection." *O'Gilvie* v. *United States*, 519 U.S. 79, 83 (1996).

The question in *O'Gilvie* was whether punitive damages resulting from a product liability award were excludable from the taxpayer-recipient's gross income under Section 104(a)(2) of the Internal Revenue Code. Section 104(a)(2) excludes from taxable gross income the "amount of any damages received . . . *on account of* personal injuries or sickness." 26 U.S.C. § 104(a)(2) (emphasis added). The taxpayer contended that the punitive damage award was "on account of personal injuries" because the personal injury was a "but for" cause of the award. 519 U.S. at 82. This Court rejected that reading of "on account of," adopting the Government's position that punitive damages were not "on account of" a personal injury, but rather were "on account of" defendant's reprehensible conduct. *Id.* at 83. The term "on account of," the Court specifically held, "impose[d] a stronger causal connection" than mere "but for" causation. *Id.*

Similarly, in *Commissioner of Internal Revenue* v. *Schleier*, 515 U.S. 323 (1995), a case addressing the same provision of the Internal Revenue Code, the Court held that a back pay settlement award under the Age Discrimination in Employment Act of 1967 was not "on account of" a personal injury. *See id.* There, the taxpayer commenced an age discrimination action arising out of his termination and argued that the resulting settlement award was excludable from his taxable income. This Court rejected that contention, explaining that when a victim of age discrimination recovers lost wages, such recovery "does not fall within [the] § 104(a)(2)[] exclusion because it does not satisfy the critical element of being 'on account of personal injury or sickness.'" *Id.* at 330. The Court added that "[i]n age discrimination, the discrimination causes both personal injury and loss of wages, but neither is linked to the other." *Id.*

The causal relationship between the Rouseys' right to payment from their IRAs and their age is certainly weaker than the connection between the damages awards in *O'Gilvie* and *Schleier* and the taxpayers' personal injuries. In those

cases, personal injury was at least a "but for" cause or closely-related cause of the taxpayers' claims. This Court nevertheless found that degree of causation insufficient, finding that another cause was more proximately responsible for the awards.

It thus follows *a fortiori* from *O'Gilvie* and *Schleier* that the "on account of" requirement cannot be satisfied here, where there is no causal relationship at all. The Rouseys' age is not even a "but for" cause of their "right to payment" from their IRAs—they enjoy such a right regardless of their age. Rather, the most that can be said is that the Rouseys' right to avoid taxes by waiting until they reach the age of 59½ to receive a payment from their IRAs is "on account of" their age. But that is a very different question from the one posed by the statute.

C. The Structure Of Section 522(d)(10) Demonstrates Congress's Intent To Require A Causal Connection Between The Right To Payment And The Triggering Event.

The structure of Section 522(d) of the Bankruptcy Code supports the view that a direct causal link must be shown between the debtor's right to payment and the triggering condition in order to fall within the exemption.

The Rouseys and their *amicus* contend that because IRAs are generally intended to provide retirees with a source of income in retirement, that is sufficient to bring the right to payment from those accounts within the scope of the exemption. But an examination of Section 522(d) itself makes clear that in drafting the exemptions set out in Section 522(d), Congress certainly knew how to impose a more general requirement of a connection between a debtor's property and the exempt purpose, and chose the more demanding "on account of" formulation with respect to the right to payment at issue here.

For example, Section 522(d)(4) provides an exemption for "the debtor's aggregate interest, not to exceed [$1,150] in

value, in jewelry held *primarily* for personal, family, or household use of the debtor or a dependent of the debtor." *See* 11 U.S.C. § 522(d)(4) (emphasis added). In this context, the fact that the jewelry might also be put to another purpose does not render it non-exempt—the requirement is only that it is held "primarily" for personal, family, or household use.

This is essentially the reading that the Rouseys and their *amicus* would engraft on Section 522(d)(10)(E). That is, notwithstanding the fact that the Rouseys have a present right to payment out of their IRAs without regard to their age or their satisfaction of the other statutory conditions, the Rouseys contend that their right to payment is exempt because a "primary" purpose of an IRA is to provide retirement benefits. *See* Pet. Br. 16-22; Amicus Br. 16-20. But Section 522(d)(4) makes clear that Congress certainly knew how to say that, but chose the more demanding "on account of" language in Section 522(d)(10)(E). There is no reason to read this clear statutory language to mean anything other than what it says.

D. The Drafting History of Section 522(d)(10)(E) Provides Further Support For The Natural Reading Of "On Account Of."

The legislative history refutes the Rouseys' contention that it is sufficient that IRAs' general purpose is to provide for retirement. Indeed, Congress considered, and expressly rejected, a legislative proposal that would have done exactly that.

The 1973 National Bankruptcy Review Commission's prior version of Section 522(d)(10)(E) exempted the debtor's rights "[b]efore or after retirement, . . . [under a retirement plan] *for the primary purpose of* providing benefits upon retirement by reason of age, health, or length of service." Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, at 172 (1973) ("1973 Commission Report") (emphasis added).

Congress, however, chose not to adopt that language, instead providing that the debtor's "right to payment" is exempt only insofar as that right is "on account of" illness, disability, death, age, or length of service. 11 U.S.C. § 522(d)(10)(E). By requiring that the "right to payment" be "on account of" age, rather than under a plan whose "primary purpose" is to provide for retirement, Congress determined that rights to payment from accounts such as IRAs, which may generally be intended to provide for retirement, but which permit withdrawals at any time without regard to age, are not exempt.[8]

II. Standard IRAs, Like The Ones Held By Petitioners, Are Not "Similar Plans Or Contracts."

The Rouseys' IRAs also are not exempt because they are not "similar" to the "stock bonus, pension, profit-sharing, [or] annuity" plans expressly mentioned in Section 522(d)(10)(E). The Rouseys principally contend that their IRAs are "similar" to those plans because IRAs, like pension plans, are subject to preferential tax treatment. That, however, is the wrong standard by which to measure similarity. The structure and purpose of the statute make clear that the central distinction is between an individual's savings accounts—which are not exempt—and "future earnings," which are. By that measure, IRAs far more closely resemble ordinary savings, and therefore are not exempt.

Exempting the future stream of payments pursuant to a traditional pension plan is consistent with the basic economic

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[8] The Third Circuit has held that a debtor may exempt the right to payment from an IRA once he or she has reached the age of 59½, but not before. *See Clark* v. *O'Neill (In re Clark)*, 711 F.2d 21 (3d Cir. 1983). Because the right to withdraw from an IRA is not linked to age regardless of the debtor's age at the time of the bankruptcy filing, we do not urge the Third Circuit's construction of Section 522(d)(10)(E) on this Court.

arrangement in chapter 7, whereby the debtor turns over his or her available assets to satisfy the claims of creditors, but enjoys a "fresh start" that allows the debtor to retain future income. The legislative history of Section 522(d)(10)(E) confirms this point: "Paragraph (10) exempts certain benefits that are akin to future earnings of the debtor." H.R. Rep. No. 95-595, at 362, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6318. Plans that operate like traditional pension plans—where the employee lacks ready access to the funds—are "similar" to the specified plans. Standard IRAs, however, are quite different, and more closely resemble ordinary savings accounts, as the holder of the account retains the right to withdraw the funds (subject only to a tax penalty). They therefore are not "similar" to the plans specified in Section 522(d)(10)(E) of the Bankruptcy Code.

A. A Standard IRA Is More Like A Savings Account Than A Pension Plan—And Therefore Is Not "Similar" To The Plans Listed In Section 522(d)(10)(E).

The shared feature of the "stock bonus, pension, profit-sharing, [and] annuity" plans identified in the statute is that all provide what amounts to a form of deferred compensation. *See* Dilley, *supra*, 74 Ind. L.J. at 429. That is, the employee lacks present access to or control over the funds. These plans are quite unlike traditional savings accounts—whose proceeds may be withdrawn at any time, and put to any purpose, by the account holder.

By contrast, Congress's express interest in encouraging savings in any form has led banks and other financial institutions to structure the standard IRA so that it may operate very much like a traditional savings account. As one commentator aptly put it, IRAs "have transmogrified . . . into all-purpose investment kitties that can be used for purposes that have little connection to the holder's retirement." Kaplan, *supra*, 7 Elder L.J. at 285.

Account holders may withdraw funds from their IRAs at any time, subject only to a modest tax penalty. And, in addition, Congress now permits withdrawals without penalty from IRAs to buy a house or for health care insurance premiums or education. *See* 26 U.S.C. § 72(t)(2)(D)-(F). As Senator Landrieu explained, IRAs have effectively become savings accounts towards objectives that Congress considers worthy: "If we can encourage people to save for the right things—to purchase a home, for catastrophic health care needs, for education to improve their productivity . . . that is really what this is about." 143 Cong. Rec. S8415, S8438 (daily ed. July 31, 1997).

However laudatory the objective, the result of this liberalization of access to funds in IRAs is that it certainly can no longer be said—if it ever could have been—that these accounts are "similar" to the traditional pension plans enumerated in Section 522(d)(10)(E).

As lower courts in the Eighth Circuit have recognized, the appropriate index of similarity for purposes of Section 522(d)(10)(E) is the extent to which the funds in question are a replacement for future wages, as opposed to ordinary savings that may be used for any purpose. *See, e.g., Eilbert* v. *Pelican*, 212 B.R. 954 (B.A.P. 8th Cir. 1997) (focusing on, *inter alia*, whether the payments were designed to be a wage substitute; contributions were made only by the employer; and the debtor's control over the asset), *aff'd*, 162 F.3d 523 (8th Cir. 1998); *Andersen* v. *Ries*, 259 B.R. 687, 694 (B.A.P. 8th Cir. 2001) (finding that an annuity met the similar plan or contract test where the debtor had no ability to withdraw funds). In short, a right to payment from a plan that is intended to provide replacement wages or another form of deferred compensation may be exempt as a "similar" plan to those specified in Section 522(d)(10)(E), while a right to

payment from a plan that operates more like an ordinary savings account cannot be.[9]

To be sure, other lower courts have engaged the "similarity" analysis at a higher level of generality—concluding that standard IRAs are "similar" to the plans listed in the statute on the ground that both types of plans are "intended," at some level, to provide a form of retirement benefit. *See, e.g., In re McKown*, 203 F.3d 1188, 1189 (9th Cir. 2000) (an IRA is "similar" to the enumerated plans because it is "a device used to provide for retirement" and serves "the public benefit of encouraging people to provide for their own retirement income").

But this broad-brush analysis asks the wrong question. Of course it is true that saving for retirement is a salutary objective. But nothing in the Bankruptcy Code remotely suggests that a debtor may retain savings—simply because he intends to use them in retirement—while failing to pay his creditors. It is not "retirement savings" that are put outside the reach of creditors, only those "right[s] to payment" under plans that are similar to the traditional pension plans listed in the statute. Standard IRAs operate more like ordinary savings accounts, and therefore must be reachable by creditors in bankruptcy.

B. Congress Rejected A Proposed Exemption Statute That Focused On Tax Qualification.

Congress expressly considered and rejected, when it enacted Section 522(d)(10)(E), language that would have exempted any plan that was "tax qualified." Specifically, the 1973 Commission Report, which was Congress' starting

[9] The overall structure of Section 522(d)(10) further demonstrates Congress's purpose of protecting wage replacement devices, not ordinary savings accounts: Subsection (d)(10)(A) exempts social security and public assistance benefits; (d)(10)(B) exempts veterans' benefits; and (d)(10)(C) exempts alimony, support, and separate maintenance. Each of these benefits replaces the debtor's wages after a life-changing event.

point in drafting the 1978 Bankruptcy Code, proposed the following exemption:

> Before or after retirement, such rights as the debtor may have under a profit sharing, pension, stock bonus, annuity, or similar plan which is established for the primary purpose of providing benefits upon retirement by reason of age, health, or length of service, and which is either (A) *qualified under section 401(a) of the Internal Revenue Code*, or any successor thereto, or (B) established by federal or state statute, to the extent in either case the debtor's interest therein is reasonably necessary for the support of the debtor and his dependents.

1973 Commission Report, at 172 (emphasis added).

Following the 1973 Commission Report, but prior to the enactment of the Bankruptcy Code, William T. Plumb, Jr., a special consultant to the Commission and an influential tax scholar,[10] argued that tax qualification should not be a basis for exemption. *See* William T. Plumb, Jr., *The Recommendations of the Commission on the Bankruptcy Laws—Exempt and Immune Property*, 61 Va. L. Rev. 1, 59-60 (1975). He argued that relying on tax qualification is arbitrary because employees have no control over whether a plan comports with the tax code and such qualification should be irrelevant in the bankruptcy context. *See id.*

[10] William Plumb wrote a series of articles at that time involving the intersection of bankruptcy and tax. *See* William T. Plumb, Jr., *The Tax Recommendations of the Commission on the Bankruptcy Laws--Tax Procedures*, 88 Harv. L. Rev. 1360 (1975); William T. Plumb, Jr., *The Tax Recommendations of the Commission on the Bankruptcy Laws--Reorganizations, Carryovers and the Effects of Debt Reduction*, 29 Tax L. Rev. 229 (1974); William T. Plumb, Jr., *The Tax Recommendations of the Commission on the Bankruptcy Laws--Priority and Dischargeability of Tax Claims*, 59 Cornell L. Rev. 991 (1974); William T. Plumb, Jr., *The Tax Recommendations of the Commission on Bankruptcy Laws-- Income Tax Liabilities of the Estate and the Debtor*, 72 Mich. L. Rev. 935 (1974).

Tax qualification, however, is at the heart of petitioners' argument: they argue that their IRAs are exempt because they satisfy the requirements of Section 408 of the Internal Revenue Code (and all IRAs which comply with Section 408 are exempt). But under the version of Section 522(d)(10)(E) that Congress enacted, a plan qualifies for exemption not because it fulfills certain tax requirements, but rather because it is similar to a traditional pension plan that is intended to pay out only upon retirement. Because standard IRAs permit access to the funds at any time, they are not "similar" to the specified plans.

C. Pre-Code Caselaw Supports The Conclusion That IRAs Are Not "Similar" Plans.

When Congress drafted Section 522(d)(10), it intended to exempt only rights to payment that were akin to replacement wages. The legislative history of Section 522(d)(10) confirms that only rights to payment that "are akin to future earnings" are exempt. *See* H.R. Rep. No. 95-595, at 362, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6318. At the time of the enactment of the Bankruptcy Code, the law was clear that a right to payment from a freely accessible source (such as an ordinary savings account or a standard IRA) was not considered "akin to future earnings."

Prior to the enactment of the Code, courts were often asked to decide whether a right to payment was considered "property" within the meaning of the Bankruptcy Act. If a right to payment was considered "property," the bankruptcy trustee was able to reach it for the benefit of creditors. If a right to payment was considered akin to "future wages," however, the debtor was allowed to keep it to make a "fresh start." *Segal* v. *Rochelle*, 382 U.S. 375, 380 (1966); *see also Kokoszka* v. *Belford*, 417 U.S. 642 (1974); *Lines* v. *Frederick*, 400 U.S. 18 (1970).

In *Lines* v. *Frederick*, the Court considered whether accrued, unused vacation pay was such "property" or was outside of the trustee's reach because it was "akin to future earnings." *Lines*, 400 U.S. at 20. The Court determined that vacation pay—which was accessible by the debtor only during vacation (or upon termination)—was akin to future wages. *See id.* at 20.

Four years later, in *Kokoszka* v. *Bedford*, the Court considered whether an income tax refund was also protected as akin to future wages. In determining that such a refund was not akin to future wages, the Court explained that while both vacation pay and an income tax refund share the characteristic of being "wage based," vacation pay was the only property "designed to function as a wage substitute at some future period and, during that future period, to 'support the basic requirements of life for (the debtors) and their families.' . . . This distinction is crucial." *Kokoszka*, 417 U.S. at 648 (citations omitted). "'Just because some property interest had its source in wages . . . does not give it special protection, for to do so would exempt from the bankrupt estate most of the property owned by many bankrupts, such as savings accounts and automobiles which had their origin in wages.'" *Id.* (quoting the lower court opinion).

The same distinction exists in this case between a traditional pension plan, which is designed like vacation pay to replace future wages only at certain times, and a standard IRA, which is not designed to replace wages but to act like a tax-favored savings account to which the debtor has unrestricted access.

III. The "Unless" Clause Does Not Render The Other Provisions Of Section 522(d)(10)(E) Superfluous.

The Rouseys contend that the reference to Section 408 of the Internal Revenue Code in Section 522(d)(10)(E)'s "unless" clause, which excludes from the exemption rights to payment under certain plans established by insiders, demonstrates that all rights to payment from IRAs are exempt.

That assertion is incorrect and contradicted by the very purpose of the exception.

A. The "Unless" Clause Means Only That Some Section 408 Plans Must Be Eligible To Qualify For The Section 522(d)(10)(E) Exemption.

Section 522(d)(10)(E) excludes from exemption certain "insider" retirement plans. Specifically, Subsections 522(d)(10)(E)(i)-(iii) establish three conditions that—if all are satisfied—disqualify a retirement plan from exemption. The statute exempts a "right to payment" from a "similar plan or contract" that arises "on account of illness, disability, death, age, or length of service" "*unless*" it: (1) was "established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose, " 11 U.S.C. § 522(d)(10)(E)(i); (2) was payable "on account of age or length of service," *id.* § 522(d)(10)(E)(ii); and (3) "does not qualify" under Sections 401(a), 403(a), 403(b) and 408, *id.* § 522(d)(10)(E)(iii). Qualification under the provisions of the Internal Revenue Code listed in Subsection (iii) thus operates as a "safe harbor" from the disqualification that the "unless" clause otherwise provides.

The manifest purpose of the "unless" clause in Section 522(d)(10)(E) is to prevent corporate insiders from using their positions to establish self-serving "retirement plans" to shield assets that would otherwise be reachable by creditors. Because tax qualification (which brings with it the requirement that the plan not discriminate in favor of highly compensated employees[11]) carries with it some assurance that

[11] *See* 26 U.S.C. §§ 401(a)(3), (a)(4), (a)(26) (effectively limiting an employer's ability to offer a plan that primarily benefits "highly compensated employees," as defined in the Internal Revenue Code). *See generally* Mary F. Radford, *Implied Exceptions to the ERISA Prohibitions Against the Forfeiture and Alienation of Retirement Plan Interests*, 1990 Utah L. Rev. 685, 700 ("The tax benefits of ERISA are available only to those plans that provide retirement benefits to a fair cross-section of employees and that do not offer disproportionately higher or better benefits to employees who are in privileged positions.").

the plan was established at arm's length, the safe harbor of Subsection (iii) reflects Congress' judgment that the safeguards involved in tax qualification were sufficient to overcome the concern for insider self-dealing that pervades the Bankruptcy Code. *See, e.g.*, 11 U.S.C. §§ 502(b)(4) (disallowing that portion of an insider's bankruptcy claim for services rendered in excess of the value of such services); *id.* § 547(b)(4)(B) (establishing a one-year reach-back period for avoiding a transfer to an insider of the debtor but a 90-day reach-back period for non-insiders).

Petitioners and their *amicus* argue that the reference to Section 408 (Individual Retirement Accounts) in Subsection 522(d)(10)(E)(iii) reflects Congress's intent to protect all IRAs with the exemption. They assert that an IRA necessarily qualifies as a "'similar plan or contract" because if plans established under Section 408 of the Internal Revenue Code did not fall within the ambit of Section 522(d)(10)(E) in the first place, the reference to Section 408 in the "unless" clause would be superfluous.

That is simply incorrect. It is certainly true that the reference to Section 408 in the "unless" clause suggests that *some* plans established under Section 408 could be "similar" plans within the meaning of Section 522(d)(10)(E). But, as described below, that proposition is not disputed. There is certainly no reason that a plan cannot be established that qualifies under Section 408 and that *also* meets the specific requirements of Section 522(d)(10)(E).

But it is quite another thing to suggest that the reference to Section 408 in the "unless" clause means that *all* Section 408 plans are necessarily exempt, regardless of whether the debtor's right to receive a payment under the particular plan in fact satisfies the other statutory requirements—such

as that it arise "on account of illness, disability, death, age, or length of service," and that the plan be "similar" to the types of plans identified in the statute. Indeed, it is the Rouseys' construction of the statute that renders the "on account of" requirement superfluous.

For similar reasons, the dicta in *Patterson* v. *Shumate*, 504 U.S. 753 (1992), does not support the Rouseys' construction of Section 522(d)(10)(E). In *Patterson*, it was argued that pension plans were not intended to be excluded from the bankruptcy estate under 11 U.S.C. § 541(c), because such a construction would render superfluous the exemption for pension plans contained in Section 522(d)(10)(E). This Court, however, rejected that argument, noting that certain IRAs that qualified under 26 U.S.C. § 408 "could be exempted under § 522(d)(10)(E)." *Patterson*, 504 U.S. at 763.

That statement is correct, but by no means supports the Rouseys' position. It is certainly the case that IRAs "could be exempted" under Section 522(d)(10)(E): if an IRA is structured so that the holder of the account is entitled to receive a payment on account of age, that right to payment would be exempt. The reason the Rouseys' rights to payment are not exempt is not because one cannot structure an IRA to fit within the exemption; it is because the Rouseys elected not to do so.

Many types of accounts qualify as IRAs under Section 408, titled "Individual Retirement Accounts," the common thread being tax-deferred savings. *See* 26 U.S.C. § 408. Section 408 lists certain requirements that an account must meet to qualify as an Individual Retirement Account. *See* http://www.irs.gov/publications/p590/ch01.html#d0e1249 (last visited October 24, 2004). If an account, by its terms, does not meet these requirements, the account will not be entitled to preferential tax treatment. Section 408, however, only sets forth minimum requirements to qualify for such beneficial tax status, and does not dictate the specific terms that banks and financial institutions can utilize to establish

IRAs. While the Internal Revenue Code designates consequences for withdrawing funds from an IRA early, *see* 26 U.S.C. § 72(t)(1), it does not mandate unrestricted access.[12]

Section 522(d)(10)(E) establishes its own requirements for an account to qualify for protection from creditors' reach, which are based on bankruptcy policy rather than tax policy. *See* Dilley, *supra*, 74 Ind. L.J. at 415-417, 435-437 (arguing that providing exemption protection for IRAs, based on tax-qualification, does not further bankruptcy policy). If an account, by its terms, does not meet the requirements of Section 522(d)(10)(E), the account cannot be exempted. Thus, qualification for the Section 522(d)(10)(E) exemption must be determined by examining the specific terms of the plan or contract sought to be exempted.

Perhaps it is true, as the Rouseys argue (Br. 10), that all or nearly all of the IRAs that are now offered by banks and financial institutions do not qualify for exemption under Section 522(d)(10)(E). If that is so, however, it merely reflects a market determination that having ready access to savings is more important than structuring the account so that the holder's right to payment from that account will be exempt in bankruptcy. Indeed, IRAs are most commonly structured with features that make them virtually identical to "bank savings accounts with favorable tax treatment." *Huebner* v.

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[12] *See* 26 U.S.C. § 408(a)-(c) (containing no provision that prohibits tailoring IRAs to restrict withdrawals until a certain age); *see also In re Skipper*, 274 B.R. 807, 818 n.8 (Bankr. W.D. Ark. 2002) ("[T]his Court finds no reason why IRAs that meet the 'on account of' requirement cannot be drafted."); *In re Zott*, 225 B.R. 160, 169 (Bankr. E.D. Mich. 1998) ("I believe IRAs can exist which do meet the 'on account of' test of § 522(d)(10)(E). There is nothing in the legislation establishing IRAs or the tax regulations regarding them which prohibits a person from including in the IRA contract [such] a provision."). Section 408(k)(4), which forbids employers from restricting access of employees to their accounts, is the sole exception. 26 U.S.C. § 408(k)(4). There is no reason, however, that such an account could not contain an annuity that pays out only when the account holder reaches a certain age.

Farmers State Bank (In re Huebner), 986 F.2d 1222, 1225 (8th Cir. 1993) (internal quotation marks omitted).

But there is no dispute that an account could be drafted so that the right to receive a payment is triggered by the mandatory "on account of" factors. The Rouseys could have set up their IRAs to restrict their access to the funds until retirement age, but elected not to. For example, an individual could purchase an annuity which is structured so that it pays upon reaching retirement age, thereby providing a replacement for wages during retirement years.

Indeed, that is exactly what the debtor did in *Andersen* v. *Ries*, 259 B.R. 687 (B.A.P. 8th Cir. 2001). She deposited inherited funds into an annuity years prior to the filing of her bankruptcy and elected to begin receiving a fixed monthly payment for the remainder of her life from the annuity. *See id.* at 689. She was accordingly unable to access the corpus of the annuity prior to a specified time, or otherwise alter the timing or amount of the monthly payment. For this reason, the court properly concluded that her right to payment from that annuity fit within the exemption provided in Section 522(d)(10)(E). *See id.* at 690.

The Rouseys, however, made a different choice. They elected to place their funds into an account that they could access at any time, for any reason. Because the Rouseys made that election, rather than the one made by the debtor in *Andersen*, it is neither surprising nor unfair that their accounts are reachable by creditors in bankruptcy.

B. The "Unless" Clause Applies Only To Plans Established By Employers And Therefore Does Not Support The Argument That Rights To Payment Under All Section 408 Plans Are Exempt.

Petitioner's contention that the "unless" clause's reference to Section 408 of the Internal Revenue Code demonstrates that "Section 522(d)(10)(E) exempts IRAs from the bankruptcy estate" (Br. 13), is flawed for an additional rea-

son. As discussed above, the "unless" clause creates an exception to the exemption established by Section 522(d)(10)(E) in order to protect creditors from self-dealing by insiders of the debtor. Accordingly, the "unless" clause excepts only rights to payment under a plan or contract "established by or under the auspices of an insider *that employed the debtor* at the time the debtor's rights under such plan or contract arose." 11 U.S.C. § 522(d)(10)(E)(i) (emphasis added).

As the name implies, however, individual retirement accounts usually are not established by employers, but by individuals—as, indeed, was the case here. *See* 26 U.S.C. § 408(a) (defining an IRA as a trust established "for the exclusive benefit of an individual or his beneficiaries" and requiring that the trustee be a bank or similar approved institution). Only certain specialized types of IRAs can be established by employers. *See id.* § 408(c), (k) (which either existed or was under consideration at the time of enactment of the Bankruptcy Code). And it is therefore only those specialized types of IRAs to which the "unless" clause pertains—not traditional standard IRAs like the one at issue here. Accordingly, the "unless" clause's reference to Section 408 does not permit an inference that rights to payment under ordinary standard IRAs are exempt.

IV. IRAs Are Generally Reachable By Creditors Outside Of Bankruptcy—And Should Be Treated Equally In Bankruptcy.

In *Guidry* v. *Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990), this Court held—outside of the bankruptcy context—that ERISA's strict prohibition on alienation of traditional pension funds barred a judgment creditor from garnishing those funds. But there is no provision of non-bankruptcy federal law that would protect IRAs from execution by creditors. *See Patterson*, 504 U.S. at 763

(noting that IRAs are "specifically excepted from ERISA's antialienation requirement").

In addition, at the time the Bankruptcy Code was enacted, state law generally permitted creditors to enforce judgments against funds in IRAs.[13] Thus, while it is certainly true that many states have amended their exemption statutes over the past 15 years so as to exempt IRAs, it is the state of the law that existed in 1978 that should inform

[13] State statutes and courts treated IRAs and self-settled Keogh plans (a Keogh plan is another type of individual plan that permitted unrestricted access at the time of the enactment of the Bankruptcy Code) similarly and failed to protect them from a judgment creditor's levy, garnishment, or execution. *See* Del. Code Ann. tit. 10, § 4902 (1978) (Delaware) (not exempting any rights under retirement plans); Ill. Rev. Stat. ch. 52, § 13 (West 1979) (Illinois) (only exempting certain government pensions); Ind. Code Ann. § 34-2-28-1 (West 1976) (Indiana) (not exempting any rights under retirement plans); Me. Rev. Stat. Ann. tit. 14, § 4401 (repealed) (West 1981) (Maine) (not exempting any rights under retirement plans although certain government pensions are listed in other statutes); N.H. Rev. Stat. Ann. § 512:21 (1989) (New Hampshire) (only exempting certain government pensions); N.Y. C.P.L.R. § 5205(c) (McKinney 1978) (New York) (only protecting trusts not created or settled by the debtor); R.I. Gen. Laws 1956, § 9-26-4 (1985) (Rhode Island) (not exempting any pension rights); *Judson* v. *Witlin (In re Witlin)*, 640 F.2d 661, 663 (5th Cir. Unit B Mar. 1981) (Florida) (self-settled Keogh found not exempt); *In re Talbert*, 15 B.R. 536, 537-38 (Bankr. W.D. La. 1981) (Louisiana) (failing to exempt an IRA); *Aronsohn & Springstead* v. *Weissman*, 552 A.2d 649, 651-652 (N.J. Super. Ct. App. Div. 1989) (superseded) (self-settled Keogh found not exempt) (superseded by statute); *Fordyce* v. *Fordyce (In re Fordyce)*, 365 N.Y.S.2d 323, 328 (N.Y. Sup. Ct. Nassau County 1974) (failing to exempt that portion of pension plan that was self-settled) (superseded by statute); *In re Goldberg*, 59 B.R. 201, 206-207 (Bankr. N.D. Okl. 1986) (Oklahoma) (failing to exempt self-settled Keogh) (superseded by statute); *In re Mace*, 4 B.C.D. 94, 95 (Bankr. D. Or. 1978) (Oregon) (failing to exempt an IRA); *In re Lowe*, 25 B.R. 86, 88-89 (Bankr. D.S.C. 1982) (South Carolina) (failing to exempt an IRA); *In re Peeler*, 37 B.R. 517, 517 (Bankr. M.D. Tenn. 1984) (failing to exempt an IRA); *In re Howerton*, 21 B.R. 621, 623-624 (Bankr. N.D. Tex. 1982) (Texas) (finding a IRA not exempt); *Ferwerda* v. *Zievers (In re Ferwerda)*, 424 F.2d 1131, 1332-1333 (7th Cir. 1970) (Wisconsin) (failing to protect a Keogh).

the construction of Section 522(d)(10)(E). *See Field* v. *Mans*, 516 U.S. 59, 72-75 (1995) (in construing provision of the Bankruptcy Code that operated against backdrop of state law: "we will look to the concept of 'actual fraud' as it was understood in 1978 when that language was added to § 523(a)(2)(A)").[14]

Because IRAs are not shielded from the reach of creditors under federal law outside of bankruptcy—and because at the time Section 522(d)(10)(E) was drafted, they generally were also reachable by creditors under state law[15]—it would be anomalous to ascribe to Congress an unspoken intent to render these same accounts, in bankruptcy, exempt from the reach of creditors.

[14] The structure of exemption law under the 1978 Bankruptcy Code demonstrates a heavy deference to the state law of exemption—permitting debtors to choose the state exemptions rather than those specified in the Bankruptcy Code, 11 U.S.C. § 522(b)(2); and—more significantly—permitting states to opt out of the federal exemptions altogether. *See* 11 U.S.C. § 522(b)(1).

[15] *See Employee Retirement Pension Benefits as Exempt from Garnishment, Attachment, Levy, Execution or Similar Proceedings*, 93 A.L.R.3d 711, 755-760 (1979) (discussing the state of pension exemption law and devoting the majority of the discussion to the protection of various types of government pensions). Private (non-government) pensions were protected only to the extent of the employer's contribution and self-settled private pension plans received little protection. *See id.* at 759-760 (discussing *Lerner* v. *Williamsburg Sav. Bank*, 386 N.Y.S.2d 906 (NY Civ. Ct. 1976) as a representative case not protecting a self-settled pension plan because the funds were contributed by the debtor and were at all times accessible by the debtor). *See also* Karen Rubner Grotberg, Comment, *There Should Be Parity in Bankruptcy Between Keogh Plans and Other ERISA Plans*, 80 Nw. U. L. Rev. 165, 171-172 (1985) (comparing the treatment of Keoghs and IRAs by courts).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

Richard Gerald Rousey and Betty Jo Rousey,
Petitioners,

v.

Jill R. Jacoway.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

As petitioners showed in our opening brief, Section 522(d)(10)(E) of the Bankruptcy Code protects assets in Individual Retirement Accounts (IRAs). IRAs confer on their holders the "right to receive * * * a payment * * * on account of illness, disability, death, [or] age." See Pet. Br. 14-15. The text of Section 522(d)(10)(E) squarely cross-references the section of the Internal Revenue Code that establishes IRAs. See Pet. Br. 13-14. The legislative histories of both the IRA provision and Section 522(d)(10)(E) express Congress's concern with protecting the ability of Americans to save for their retirement. See Pet. Br. 16-28.

In claiming otherwise, respondent makes a perverse argument: that Congress somehow excluded the most widely available congressionally created retirement savings vehicle – one which the statute itself calls an "individual *retirement* account," 26 U.S.C. 408 (emphasis added) – from the very bankruptcy code provision that protects a debtor's retirement savings.[1]

Petitioners have shown that the only reasonable construction of Section 522(d)(10)(E) harmonizes it with Section 408 of the Internal Revenue Code by permitting a debtor to retain that part of his or her IRA that is "reasonably necessary for the support of the debtor and any dependent of the debtor." See Pet. Br. 13-14. Indeed, in *Patterson* v. *Shumate*, 504 U.S. 753 (1992), this Court recognized the breadth of Section 522(d)(10)(E) and stated that IRAs "could be exempted under § 522(d)(10)(E)." *Id.* at 763 & n.6. That

[1] For ease of exposition, petitioners use the term "retirement plans" to describe plans eligible for exemption under Section 522(d)(10)(E). Payment triggers under Section 522(d)(10)(E) include "illness, disability, death, age, *or* length of service" (emphasis added). Therefore, the exemption may also be available to plans or contracts whose primary purpose is to protect their holders in other circumstances as well.

recognition has informed the near unanimous agreement among the courts of appeals, the district courts, and bankruptcy courts that funds held in an IRA are eligible for exemption. See Pet. Br. 11-12 & n.5.

Respondent's implausible conclusion rests on two false premises. First, she claims that IRAs are not really retirement-savings vehicles, because holders of IRAs can, under certain circumstances, gain access to their funds before retirement. Therefore, she asserts, IRAs operate more like "all-purpose investment kitties" than retirement plans, and the right to receive payment from an IRA is not "on account of" the factors identified in Section 522(d)(10)(E). See Resp. Br. 7, 8, 15, 22. In fact, as a legal matter, holders of IRAs have the *right* to receive payments under precisely the triggering events listed in Section 522(d)(10)(E), as well as a few other carefully delimited circumstances. Otherwise, if they seek early access to the funds, they are subject to a significant penalty. See 26 U.S.C. 72(t). The fact that someone can engage in behavior if he or she is willing to pay a substantial penalty can hardly be described as conferring a "right" to engage in the conduct.

Second, respondent claims that IRAs are somehow unique among retirement vehicles because holders may access funds in their accounts prior to reaching retirement age. Therefore, she claims, IRAs fail the statutory requirement of being a "*similar* plan or contract" to other "stock bonus, pension, profitsharing, [or] annuity" plans that do qualify for exemption under Section 522(d)(10)(E). See Resp. Br. 21-27. Here, respondent is flatly mistaken. Stock bonus plans, pensions, profitsharing plans, and annuities – the other retirement vehicles listed in Section 522(d)(10)(E) – *all* treat early withdrawals in precisely the same way that IRAs do. Respondent's argument would lead to the untenable conclusion that many of the plans Congress expressly lists in Section 522(d)(10)(E) would not themselves be exempt. See Pet. Br. 11. This reading would leave the exemption nothing but an empty shell.

The judgment below should accordingly be reversed.

I. IRAs Are Retirement Vehicles, Rather than General Savings Accounts.

The core of respondent's first argument – that IRA payments are not "on account of age" – is that IRAs are not really retirement vehicles. However, the plain-language reading of 26 U.S.C. 408 confirms that IRAs do indeed operate as retirement plans. IRAs function by permitting individuals to set aside a relatively modest amount of money each year in an account in which the money compounds on a tax-deferred basis. When an individual reaches one of the triggering events identified in 26 U.S.C. 72(t)(2) – significantly, a list of triggering events that dovetails with the list provided in Section 522(d)(10)(E) – he or she has the right to withdraw accumulated funds. IRAs are thus a quintessential retirement savings device. And they differ in significant ways from general savings accounts.

A. Congress established IRAs to enable individuals to save for their retirements.

As petitioners explained in our opening brief – and respondent acknowledges, see Resp. Br. 6 – Congress established IRAs for the important purpose of enabling more Americans to save for retirement. Specifically, Congress concluded that "the present law discriminate[d] against employees not covered by retirement plans and against the self-employed," and recognized "the need on equity grounds to grant individuals who [were] not covered by any kind of qualified pension plan some of the tax advantages associated with such plans by providing them with a limited tax deduction for their retirement savings." H.R. Rep. No. 93-807 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670. As Congress has revised the retirement scheme over the years, it has repeatedly emphasized the crucial role played by IRAs. See, *e.g.*, H.R. Rep. No. 107-797 (2003) (highlighting that an

increase in IRA contribution limits would make it "easier for American workers to save more for retirement").[2]

Respondent seeks to avoid the conclusion that IRAs continue to be a retirement savings vehicle by pointing to two features of IRAs: first, that individuals can gain access to their funds for whatever purpose they wish if they pay a excise penalty, see, *e.g.*, Resp. Br. 15, and second, that Congress has also permitted individuals to withdraw funds from IRAs to buy a first home, go to college, or to pay for health care premiums, see *id.* 23. Neither of these arguments has merit.

Respondent's primary claim that individuals have a "right" to withdraw money from an IRA at any time, subject to what she describes as a "modest" tax penalty, Resp. Br. 23, involves a peculiar species of linguistic legerdemain. In fact, the structure of Section 72(t) of the Internal Revenue Code makes clear that Congress imposes a significant *penalty* on individuals who remove funds from an IRA without satisfying the triggering events. To say that an individual who is penalized for engaging in particular conduct has a "right" to engage in the conduct because he is willing to pay the penalty is absurd. Under respondent's logic, people have the "right"

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[2] The importance of IRAs to the American workforce is clear. For example, IRAs often constitute the sole retirement vehicle available to the self-employed. In 2002, nearly fifteen million American workers were reported as self-employed. Lynn A. Karoly & Julie Zissimopoulos, *Self-Employment Among Older U.S. Workers*, 127 U.S. DEP'T LABOR: MONTHLY LABOR REV. 7, at 24 (2004), *available at* http://stats.bls.gov/opub/mlr/2004/07/art3full.pdf. Among these self-employed individuals, the majority are nearing retirement age. In 2002, fifty-four percent were age forty-five or older – making retirement savings a particularly pressing near-term concern. *Ibid.* Similarly, a growing part of the workforce – employees who work for employers that do not provide an employer-sponsored retirement plan – find IRAs a critical mechanism for their retirement savings.

to park anywhere they please – in a handicapped parking space, in front of a fire hydrant, or even on the sidewalk – as long as they are willing to pay the ensuing parking ticket. That cannot be a correct construction of the word "right."

Nor, contrary to respondent's suggestion, is the penalty "modest." A working individual with an IRA, whose gross income is taxed at a rate of twenty-five percent, must pay a thirty-five percent federal tax on any amount she withdraws early. See 26 U.S.C. 72(t)(2). Thus, if she withdraws $50,000 from the IRA, she must pay a total of $17,500 in federal taxes – $5000 of which is purely a result of the penalty. If she waits until reaching retirement age, or otherwise qualifies for one of the other triggering events, not only will she avoid the ten percent penalty, but she will likely fall within a lower federal income tax bracket as a result of having no employment income. Thus, her withdrawal might be taxed at only a fifteen percent rate, and she would pay only $7,500 to withdraw the same $50,000 – that is fifty-seven percent less than the amount she would have paid for an early withdrawal.

Respondent's second claim – that the existence of other payment triggers means that IRA payments cannot be "on account of" the factors listed in the statute – is equally flawed. A retirement plan exemptible under Section 522(d)(10)(E) is one for which the right to payment arises "on account of illness, disability, death, age, or length of service." Petitioners have demonstrated that four of these triggers are identical to those that provide holders of an IRA with an unfettered right to withdraw their funds. See Pet. Br. 14-15 (comparing tax treatment of IRAs under 26 U.S.C. 72(t)(2) with 11 U.S.C. 522(d)(10)(E)). The fact that petitioners may also have the right to withdraw funds for three other reasons – to purchase a first home, to pay for higher education, and to cover some medical insurance – is irrelevant. As respondent herself realizes, the list of triggering factors in Section 522(d)(10)(E) is non-exclusive. See Resp. Br. 15 (noting that "[a] right to receive a payment from a traditional pension plan

may * * * arise 'on account of age' even if it may also in certain specific circumstances arise 'on account of' other factors"); see also *id.* 17; *Dettman* v. *Brucher (In re Brucher)*, 243 F.3d 242, 244 (CA6 2001) ("[Section 522(d)(10)(E)] does not require that the payment be made 'solely' on account of age."); *Carmichael* v. *Osherow (In re Carmichael)*, 100 F.3d 375, 379 (CA5 1996) ("The language of the subject section does not express a requirement that the right to receive a payment under a 'similar plan or contract' be conditioned 'only' or 'solely' or 'exclusively' on one of the five listed events.").

This is necessarily the case, because all of the other plans listed in Section 522(d)(10)(E) – stock bonus, pension, profitsharing, and annuity plans – confer the right to receive payment for reasons other than those enumerated in the statute. See, *e.g.*, 26 U.S.C. 72(t)(2)(C), 72(t)(3)(A) (providing that *non*-IRA retirement plans allow "[p]ayments to alternate payees pursuant to qualified domestic relations orders").

In short, whatever else is true of IRAs, they clearly are savings vehicles that provide their holders with the "right to receive * * * a payment * * * on account of illness, disability, death [or] age," and thus fall squarely within the plain language of Section 522(d)(10)(E). Therefore, funds in an IRA are eligible for exemption in bankruptcy as long as the funds also meet the other strictures of Section 522(d)(10)(E) – the funds must be "reasonably necessary for the support of the debtor and any dependent" and the IRA must comply with Section 408 of the Internal Revenue Code.

B. IRAs differ in important material respects from savings accounts.

Respondent contends that IRAs resemble ordinary savings accounts "far more closely" than they resemble the other retirement plans listed in Section 522(d)(10)(E). Resp. Br. 21. She draws an unsupportable distinction between IRAs on the one hand and plans that provide "future wages" on the

other. *Id.* 21-22. This contention disregards the very function of an IRA. See, *e.g.*, H.R. Rep. No. 93-807 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670 (noting that "the objective" of provisions to strengthen IRAs was "to encourage adequate provision for retirement needs"); *Dettman*, 243 F.3d at 243 ("IRAs, similarly, are 'substitutes for future earnings * * *.'"); *Carmichael*, 100 F.3d at 378 ("IRAs too are substitutes for future earnings in that they are designed to provide retirement benefits to individuals.").

Contrary to respondent's claims, even the most basic features of an IRA make clear they in no way "operate * * * like a traditional savings account." Resp. Br. 22:

1. *A circumscribed right to withdraw funds.* IRAs permit withdrawals, without severe tax penalties, only on very narrow grounds enumerated by statute: principally, on account of illness, disability, the death of the account holder, or when the account holder reaches age 59½. 26 U.S.C. 72(t)(2). On the other hand, traditional savings accounts permit penalty-free withdrawals for *any* reason at *any* time. IRAs' restrictions on withdrawal, and the resulting tax penalty, make clear that IRAs were designed to provide retirement funds for older individuals, not to serve as substitutes for a savings account. See *Carmichael*, 100 F.3d at 378 ("The age limitation on withdrawal illustrates Congress' intent to provide income to an individual in his advanced years.").

2. *A strictly limited right to deposit funds.* As with other retirement plans, federal law imposes tight restrictions on contributions to IRAs. See Internal Revenue Serv., Traditional IRAs, *at* http://www.irs.gov/publications/p590/ch01.html#d0e1417 (specifying IRA contribution limits). Currently, individuals may contribute no more than $3000 annually to an IRA. *Ibid.* In contrast, there are no limits on the amount of money an individual can deposit in a standard savings account.

3. *The right to accept "rollover" funds from other retirement vehicles.* Unlike any general savings account, IRAs accept rollover funds from other retirement plans without incurring tax liability. In fact, almost half of all traditional IRAs – including the IRAs in this very case – are composed, at least in part, of funds that have been rolled over from other employer-sponsored retirement plans See *IRA Ownership in 2003*, 12 INVESTMENT CO. INST. RESEARCH IN BRIEF 3, at 8 (2003), *available at* http://www.ici.org/statements/fundamentals/fm-v12n3.pdf. This rollover feature, unavailable in a savings account, embodies Congress's goal of "facilitat[ing] portability of pensions." H.R. Conf. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038. The ease of transfer plainly shows that IRAs serve a function identical to that of other plans listed in Section 522(d)(10)(E).

Simply put, an individual who wanted to access funds with the ease of a savings account would open one. He or she would not instead subject the funds to the strict contribution and withdrawal restrictions associated with IRAs.

C. Petitioner's case aptly demonstrates the critical function of IRAs in retirement.

Petitioners' treatment of their accounts is consistent with the understanding of an IRA as a retirement plan rather than as a general savings vehicle. Despite the grave financial need that eventually led to their filing for bankruptcy, petitioners did not touch their IRAs. If IRAs were not retirement funds in practice, petitioners would not have treated theirs like one: they would have spent the funds prior to filing for bankruptcy and would not now be seeking exemption. See, *e.g.*, *In re Ward*, 129 B.R. 664, 668 (Bankr. W.D. Okla. 1991) (stating that "the very existence of a bankrupt debtor's savings account is indeed a rarity").

There is no question that petitioners' IRAs constituted their sole source of retirement income. See Pet. App. 5a. This was not by choice: as a result of their involuntary layoff, petitioners were forced to "roll over" their accumulated

retirement savings from their 401(k) plans – which would have been exempt even under respondent's cramped reading of the Bankruptcy Code – into IRAs. Pet. Br. 2.[3] Petitioners' experience is hardly unique. In the year 2000, for example, more than four million taxpayers rolled more than $225 billion into traditional IRAs from other pension plans and annuities. Peter J. Sailer & Sarah E. Nutter, *Accumulation and Distribution of Individual Retirement Arrangements, 2000*, 2004 INTERNAL REV. SERV. STATISTICS OF INCOME BULLETIN, at 121, *available at* http://www.irs.gov/pub/irs-soi/00retire.pdf.

Congress simply could not have wished to exempt certain retirement plans, yet to deny exemption to the *very same* assets once they are, for reasons beyond individuals' control, rolled over to IRAs. Indeed, individuals who have been laid off from their jobs (and forced to roll their pension savings into IRAs) are particularly likely to become bankrupt. As petitioners articulated in their opening brief, Pet. Br. 19, respondent's reading of the statute would "create a trap for the unwary," *Carmichael*, 100 F.3d at 378, punishing debtors for employing what is often their only available retirement vehicle.

II. IRAs Satisfy the "Similar Plan or Contract" Criterion of Section 522(d)(10)(E).

The core of respondent's second argument is that an IRA is not a "similar plan or contract" to the other retirement

[3] Respondent's reliance upon *Andersen* v. *Ries*, 259 B.R. 687 (B.A.P. CA8 2001), as evidence that petitioners could have invested in a more "retirement-like" account is plainly refuted by the facts of that case. Respondent erroneously states that the debtor in *Andersen* was "unable to access the corpus of the annuity prior to a specified time." Resp. Br. 32. In fact, the debtor in *Andersen* "*had the right to withdraw the funds prior to the time she began receiving payments*," and her withdrawal rights ceased only when her retirement payments commenced. 259 B.R. at 692 (emphasis added).

vehicles listed in Section 522(d)(10)(E) because "IRAs, *unlike any of the other plans listed in the statute*, permit the holder to have unrestricted access to the funds for any reason at all, subject only to a 10 percent tax penalty." Resp. Br. 15 (emphasis added).[4] This statement is plainly wrong: *all* of the other plans listed in the statute have the same tax structure, and thus IRAs are unquestionably "similar" to these plans.

A. IRAs are in all relevant respects similar to the other plans listed in Section 522(d)(10)(E).

As noted above, IRAs were created for the purpose of providing retirement vehicles to a wider class of individuals. See Pet. Br. 16-22; *supra*, at 3-6. This similarity of purpose has resulted in their nearly identical treatment under federal law. Internal Revenue Code Section 4974(c) defines "qualified retirement plans by incorporation" to include IRAs along with every other plan listed in Section 522(d)(10)(E): stock bonus plans, pension plans, profitsharing plans, and annuities. See also 26 U.S.C. 401(a). Each of these plans permits the holder to set aside a limited amount of pre-tax income for withdrawal at a later time. Pet. Br. 15; see also 26 U.S.C. 219 (specifying the permissible level of tax-exempt contributions to retirement plans during any given tax year).

Withdrawal from each of these "qualified retirement plan[s]," including IRAs, is governed by Internal Revenue Code Section 72(t), which enforces the use of these plans as "retirement" vehicles by limiting the right to receive a payment to a narrow set of circumstances. Outside of the enumerated circumstances, any withdrawal from *any* of these retirement vehicles incurs a ten-percent tax penalty on top of the tax rate normally applicable to the holder's gross income. See 26 U.S.C. 72(t)(1); see also *supra*, at 5. The purpose of this penalty is "[t]o discourage the use of pension funds for

[4] As noted *supra*, at 4-5, the very idea that access can be "unrestricted" when it is "subject * * * to a 10% tax penalty" is a non sequitur.

purposes other than normal retirement * * *." Internal Revenue Serv., Tax Topic 558, *at* http://www.irs.gov/taxtopics/tc558.html; see Patricia E. Dilley, *Hidden in Plain View: The Pension Shield Against Creditors*, 74 IND. L.J. 355, 403-04 (1999) (stating that Internal Revenue Code provisions dealing with pension plans "apply penalties for distributions prior to retirement, but do not actually prohibit such distributions").

Individuals thus can and do make early withdrawals, not only from IRAs, but also from other qualified retirement plans when authorized by the plan. The primary document completed by taxpayers each year – Form 1040 – expressly anticipates and provides for such withdrawals. The instructions for that form explain how certain individuals who "received an early distribution from (a) an IRA *or other qualified retirement plan*, [or] (b) *an annuity* * * *" can assess their ten-percent penalty. See Internal Revenue Serv., 2003 1040 Instructions, *available at* http://www.irs.gov/pub/irs-pdf/i1040.pdf, at 39 (emphasis added); see also Internal Revenue Serv., Form 5329, *available at* http://www.irs.gov/pub/irs-pdf/f5329.pdf (providing an alternate way to disclose withdrawals from "*a qualified retirement plan* (including an IRA)" before age 59½) (emphasis added); Internal Revenue Serv., Frequently Asked Questions – 5.3 Pensions and Annuities: Distributions, Early Withdrawals, 10% Additional Tax, *at* http://www.irs.gov/faqs/faq5-3.html (explaining the protocol for those who "cash in a pension plan while in [their] thirties").

Tax-penalized early withdrawal thus cannot form the basis for finding IRAs to be dissimilar from pension plans, stock bonus plans, profitsharing plans, and annuities. Nothing in the tax code prohibits accessing funds from *any* of these plans at any time, provided that the holder is willing to pay a tax penalty. Respondent's reading of Section 522(d)(10)(E) as precluding exemption for plans with such a feature would eviscerate the statute by effectively

disqualifying the very plans and contracts listed in Section 522(d)(10)(E) from eligibility for exemption.[5] See also Pet. Br. 11.

B. Respondent's "similarity" analysis is legally unsupportable.

Respondent's suggestion that IRAs are somehow dissimilar from the retirement vehicles listed in Section 522(d)(10)(E) suffers not only from the factual error detailed above, but also from two additional legal flaws.

First, respondent errs by asserting that "traditional pension plans" are the benchmark to which IRAs must be compared to determine their similarity. See, *e.g.*, Resp. Br. 7-8. As a textual matter, "pension plans" are not the entire comparison set – the comparison set explicitly includes annuities, profitsharing, and stock bonus plans as well. As a legal matter, "traditional pension plans" are largely outside Section 522(d)(10)(E) altogether because their treatment in bankruptcy is governed by Section 541(c)(2), as this Court held in *Patterson* v. *Shumate*, 504 U.S. 753 (1992) (determining that ERISA-qualified plans are categorically excluded from a debtor's estate under Section 541(c)(2)). Only non-ERISA qualifying pension plans fall within Section 522(d)(10)(E) in the first place, and so the relevant question is whether IRAs are similar to these plans.

Second, respondent errs by suggesting that "similarity" requires IRAs to be identical in every detail to each of the other listed retirement vehicles. As this Court has explained,

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[5] For example, respondent's reading of the statute would exclude from exemption the right to receive a payment under the New York City Police Department pension plan, because that plan allows for early (and tax-penalized) withdrawal. See Letter from Patrick J. Lynch, President, Patrolmen's Benevolent Ass'n of the City of New York, Inc., to Delegates and Members (Mar. 1, 2002), *available at* http://www.nycpba.org/tadam/archive/02/tadam-020301-90.html (indicating the availability of tax-penalized early withdrawal from the NYPD pension plan).

in deciding whether two things are "similar," the answer depends only on *relevant* commonalities and distinctions, for "[s]imilarity is not identity but resemblance between different things." *United States* v. *Raynor*, 302 U.S. 540, 547 (1938). Thus, in construing a statute that required customs duties on an enumerated category of goods and "all goods of similar description," the Court stated that "[t]he statute does not contemplate that [the] goods * * * shall be in all respects the same. If it did, these words would be unnecessary. They were intended to embrace goods like, but not identical with, [the specified goods.]" *Greenleaf* v. *Goodrich*, 101 U.S. 278, 283 (1879).

Here, along every relevant dimension, IRAs resemble the other plans and contracts listed in Section 522(d)(10(E). IRAs are like the other listed plans with respect to their primary purpose: to enable Americans to save for their retirement. IRAs are like the other plans with respect to the list of events that trigger a right to withdraw funds: "illness, disability, death, [and] age." IRAs are like the other plans with respect to distinctive tax treatment under the Internal Revenue Code. Respondents have pointed to *no* relevant dissimilarity between IRAs and the other savings vehicles listed in Section 522(d)(10)(E).

C. The legislative history upon which respondent relies confirms that IRAs are similar to the other plans listed in Section 522(d)(10)(E).

The very legislative history identified by respondent, see Resp. Br. 24-26, in fact reinforces the view that an IRA is a "similar plan or contract" for purposes of Section 522(d)(10)(E). As petitioners explained in our opening brief, the language originally proposed for Section 522(d)(10)(E) would have exempted only retirement assets held in plans established under 26 U.S.C. 401(a), which governs "pension, profit-sharing, and stock bonus plans." But Congress explicitly broadened the language to cover plans defined in

Sections 403 (annuities) and 408 (IRAs) as well. See Pet. Br. 27-28.

Respondent reads this legislative history precisely backward, somehow seeing Congress's *refusal to limit* Section 522(d)(10)(E) to Section 401(a) plans as a wholesale rejection of the idea that identical treatment under the Internal Revenue Code is an indicator of plan similarity. Respondent provides no evidence in either the text or the legislative history for this assertion. Not only does her position defy logic – because tax preference is the very essence of IRAs and other congressionally recognized retirement savings vehicles – but it ignores the final language adopted by Congress, which explicitly mentions IRAs *in addition to* plans qualified under Section 401(a). See 11 U.S.C. 522(d)(10)(E)(iii).

Respondent concedes, as she must, that the explicit mention of IRAs in Section 522(d)(10)(E)(iii) means that "some section 408 plans must be eligible to qualify for the section 522(d)(10)(E) exemption." Resp. Br. 28 (capitalization omitted). But she seeks to avoid the force of this concession by suggesting that only IRAs that contain provisions that *no existing IRA has ever contained* can qualify for exemption. She gives no reason for supposing Congress meant to protect a null set. And she compounds her error by misreading what she calls the "unless" clause.[6] Respondent

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[6] Section 522(d)(10)(E) makes funds in a plan or contract eligible for exemption "unless –

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986."

argues that because the "unless" clause applies only to employer-established plans, it does not support the argument that all IRAs are exempt. See Resp. Br. 32-33. What respondent fails to understand is that because the "unless" clause is phrased in the conjunctive, it necessarily means that an individual retirement account that *does* satisfy the criteria for preferential tax treatment under Section 408, which all standard IRAs do,[7] is eligible for exemption under Section 522(d)(10)(E). Nothing in the text or legislative history suggests that that eligibility exists only for Section 408-qualified IRAs established under the auspices of an employer. The only plausible reading of the statute is that both individually created and employer-sponsored IRAs qualify for exemption under Section 522(d)(10)(E) as long as they qualify for preferential tax treatment under Section 408.

III. Respondent's Reliance on the Treatment of IRAs Outside of Bankruptcy Is Misplaced.

Respondent's final argument is that because *federal* law does not protect IRAs from the reach of creditors outside the bankruptcy context, IRAs should not be protected within bankruptcy either. Resp. Br. 33-35. This argument rests on a serious misreading of two of this Court's decisions, *Patterson* v. *Shumate*, 504 U.S. 743 (1992), and *Field* v. *Mans*, 516 U.S. 59 (1995).

To be sure, *Patterson* did recognize that pension plans governed by ERISA are protected, in bankruptcy and out, from the reach of creditors. But that very fact removed ERISA-governed pension plans from the ambit of Section 522(d)(10)(E) altogether, triggering their treatment instead under Section 541(c)(2). See *Patterson*, 504 U.S. at 759-60. Nothing about the fact that a retirement vehicle does not

[7] Indeed, compliance with Section 408 is what makes an individual's act of saving for retirement into an "Individual Retirement Account" as opposed to simply an informal retirement savings practice.

qualify for *exclusion* from the debtor's estate under Section 541(c)(2) determines whether it can qualify for *exemption* under Section 522(d)(10)(E). Indeed, *Patterson* makes precisely that point with respect to IRAs:

> [Section] 522(d)(10)(E) exempts from the bankruptcy estate a much broader category of interests than § 541(c)(2) excludes. For example, pension plans established by governmental entities and churches need not comply with Subchapter I of ERISA, including the antialienation requirement of § 206(d)(1). See 29 U. S. C. §§ 1003(b)(1) and (2); 26 CFR § 1.401(a)-13(a) (1991). So, too, pension plans that qualify for preferential tax treatment under 26 U. S. C. § 408 (individual retirement accounts) are specifically excepted from ERISA's antialienation requirement. See 29 U. S. C. § 1051(6). Although a debtor's interest in these plans could not be excluded under § 541(c)(2) because the plans lack transfer restrictions enforceable under "applicable nonbankruptcy law," that interest nevertheless could be exempted under § 522(d)(10)(E).

Patterson, 504 U.S. at 762-63 (footnote omitted). Thus, far from undermining petitioners' argument, *Patterson* reinforces it.

Respondent recognizes that *state* law, as opposed to federal law, often provides IRAs with protection from creditors, both outside and inside bankruptcy. Indeed, Arkansas law itself provides such protection. Ark. Code Ann. 16-66-220 (Supp. 2003) provides, in pertinent part, that an individual's "right to the assets held in or to receive payments, whether vested or not * * * under an individual retirement account * * * is exempt from attachment, execution, and seizure for the satisfaction of debts unless the plan, contract, or account does not qualify under the applicable provisions of the Internal Revenue Code of 1986."[8]

[8] Arkansas did, at one time, opt out of the federal exemptions in favor of its state exemptions, which contained an exemption for

Faced with the reality that "many states have amended their exemption statutes over the past 15 years so as to exempt IRAs" from creditors' judgments outside of bankruptcy, Resp. Br. 34; see also Dilley, *supra*, app. at 439-46 (listing state protection of IRAs outside of bankruptcy), respondent seeks to avoid the force of this point by arguing that in 1978, when Congress enacted the Bankruptcy Code, states did not provide such out-of-bankruptcy protection for IRAs, and thus Congress must not have intended to protect them within bankruptcy. Resp. Br. 34-35.

Respondent's sole support for her argument is this Court's decision in *Field* v. *Mans*, 516 U.S. 59 (1995). See Resp. Br. 35. But she flatly misunderstands the fundamental nature of this Court's inquiry in *Mans*. *Mans* concerned Section 523(a)(2)(A) of the Bankruptcy Code, which provides, in pertinent part, that a debtor is not entitled to discharge in bankruptcy "from any debt * * * for money, property, [or] services * * * to the extent obtained by * * * false pretenses, a false representation, or actual fraud * * *." The question before the Court in *Mans* was how to construe the phrase "actual fraud": did it require proof that the creditor reasonably relied on any misrepresentation or was it enough for the creditor simply to meet the less stringent standard of

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IRAs. See Ark. Code Ann. 16-66-218(b)(16) (providing for exemption of up to $20,000 of contributions to an IRA). But after the Arkansas Supreme Court held that Art. 9, § 2 of the Arkansas Constitution acts as a cap on the dollar amount of exemptible property, courts in bankruptcy proceedings have refused to permit the exemption of property in excess of the cap. See, *e.g.*, *Federal Sav. & Loan Ins. Corp.* v. *Holt (In re Holt)*, 894 F.2d 1005 (CA8 1990); *In re Giller*, 127 B.R. 215 (Bankr. W.D. Ark. 1990); *In re Hudspeth*, 92 B.R. 827 (Bankr. W.D. Ark. 1988). Thus, Arkansas amended its law to permit a debtor to choose between the exemptions contained in 11 U.S.C. 522(d) and "the property exemptions provided by the Constitution and the laws of the State of Arkansas * * *." 1991 Ark. Acts 345 (codified as Ark. Code Ann. 16-66-217 (Supp. 2003)).

showing justifiable reliance? The Court noted that the "substantive terms" in Section 523(a)(2)(A) "refer to common-law torts," 516 U.S. at 69, and thus applied the "well established" rule "that where Congress uses terms that have accumulated settled meaning under * * * the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Ibid.* (quotation marks omitted). In determining that meaning, the Court looked to the common law meaning of "'actual fraud' as it was understood in 1978 when [the relevant] language was added to § 523(a)(2)(A)." *Id.* at 70.

The present case simply does not implicate the rule of construction used in *Mans*.[9] First, respondent fails to identify any "substantive ter[m]" in Section 522(d)(10)(E) whose meaning depends on the common law. To the contrary, to the extent that Section 522(d)(10)(E) refers to any terms defined elsewhere, it refers only to provisions of the Internal Revenue Code. Second, the very fact that Section 522(d)(10)(E) protects "similar plan[s] or contract[s]" as well as an enumerated list is powerful evidence that rather than freezing the universe of protected plans as of 1978, Congress understood that other methods of retirement savings might

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[9] Indeed, even *Mans* did not adopt the argument respondent claims it supports. As this Court noted at least three times, the common law meaning of "actual fraud" prevalent in 1978 was *the same* as the common law meaning in 1995. See *Mans*, 516 U.S. at 70 ("Then, *as now*, the most widely accepted distillation of the common law of torts was the Restatement (Second) of Torts (1976).") (emphasis added); *id.* at 71 (referring to "the edition of Prosser's Law of Torts available in 1978 (*as well as its current successor*)") (emphasis added); *id.* at 72 (noting that various "authoritative syntheses surely spoke (*and speak today*) for the prevailing view of the American common-law courts") (emphasis added). Thus, *Mans* itself did not even present the question of how to treat post-enactment changes in state statutory law.

emerge and that, to the extent they were "similar" to "stock bonus, pension, profitsharing, [or] annuity" plans, they too should be eligible for exemption. Indeed, shorn of respondent's specious rule of statutory construction, the treatment of IRAs by non-bankruptcy law in the states, to the extent it is relevant at all, supports petitioners' position. Respondent concedes, as she must, that many states have amended their laws to protect IRAs from non-bankruptcy creditors to the same extent that they protect other forms of retirement savings. Resp. Br. 34; see also Dilley, *supra*, at 439-46. This trend reflects petitioners' core point: that IRAs are similar to other retirement vehicles, and thus should be treated the same way by Section 522(d)(10)(E).

IV. The Exemption of IRAs Will Not Provide a Windfall to Debtors Because Section 522(d)(10)(E) Only Allows Exemptions to the Extent that They Are "Reasonably Necessary."

Respondent asserts that IRAs should not be analogized to other retirement plans because they could "be used for purposes that have little connection to the holder's retirement." Resp. Br. 22 (quotation marks omitted). This alarmist argument is simply meritless given Section 522(d)(10)(E)'s explicit limitation on eligibility for exemption. Funds in a debtor's IRA are exempt *only* "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." 11 U.S.C. 522(d)(10)(E).[10]

[10] For example, the court in *In re Burkette* noted eleven factors that courts examine in determining reasonable necessity: "(1) Debtor's present and anticipated living expenses; (2) Debtor's present and anticipated income from all sources; (3) *Age of the debtor* and dependents; (4) Health of the debtor and dependents; (5) Debtor's ability to work and earn a living; (6) Debtor's job skills, training and education; (7) Debtor's other assets, including exempt assets; (8) Liquidity of other assets; (9) Debtor's ability to save for retirement; (10) Special needs of the debtor and dependents; (11) Debtor's financial obligations, e.g., alimony or support payments." 279 B.R. 388, 394 (Bankr. D.D.C. 2002) (emphasis added).

Thus, if a bankruptcy court concludes that the funds are likely to be used for any other purpose, it will require that those funds be turned over to the trustee for distribution to creditors.

For example, one of the major factors that courts have examined in determining whether funds in an IRA should be exempt is the age of the debtor. Petitioners in this case are at or near the end of their employable years and thus have no realistic ability to re-accumulate their retirement savings. On the other hand, courts have limited or refused an exemption when it has been invoked by younger debtors, who are further from retirement. See Pet. Br. 31-32 (citing examples).

As the Fifth Circuit correctly stated, a "bankruptcy court's authority and obligation to determine the extent to which funds are necessary * * * work as a safeguard to prevent debtors from stashing away assets in fraud of creditors, thereby ensuring that the proverbial shield cannot be used as a sword." *Carmichael*, 100 F.3d at 380. Thus, Section 522(d)(10)(E) is entirely capable of preventing the danger that respondent hypothesizes.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in petitioners' opening brief, the judgment should be reversed.

Respectfully submitted.

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IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD GERALD ROUSEY and BETTY JO ROUSEY,
Petitioners,

v.

JILL R. JACOWAY,
Respondent.

On a Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF AARP AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether a debtor's right to receive payments from the debtor's own Individual Retirement Account (IRA), complying with the Internal Revenue Code (I.R.C.) § 408, qualifies as "exempt property" under 11 U.S.C. § 522(d)(10)(E) of the Bankruptcy Code.

2. Whether the exemption under 11 U.S.C. § 522(d)(10)(E) includes a debtor's right to receive future payments from a qualified IRA where the debtor is neither receiving – nor is yet eligible to receive – payments in accordance with the Internal Revenue Code.

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INTEREST OF AMICUS CURIAE[1]

In the last year, more than 1.6 million Americans made the difficult and painful decision to file for personal bankruptcy. Americans age 65 and older are now the fastest growing group in bankruptcy.

AARP is a nonpartisan, nonprofit membership organization of more than 35 million people age 50 or older, working and retired, that is dedicated to addressing the needs and interests of older Americans. As *amicus*, it periodically has provided the Supreme Court with the perspective of its members. Last year, for example, AARP submitted an *amicus* brief in *Till v. SCS Credit Corp.*, 124 S. Ct. 1951 (2004), a decision that established the appropriate rate of interest on secured debt in Chapter 13.

Almost half of AARP's members work, and many contribute to a variety of retirement savings plans, including Individual Retirement Accounts (IRAs). Increasingly, older Americans, often with decades of work experience, find themselves unable to avoid financial devastation from job layoffs, catastrophic illness, loss of a spouse, or downturns in the nation's economy. After exhausting other options, many turn to the bankruptcy system to try to save their homes, to obtain limited relief from creditors, and to protect retirement

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[1] Each party's written consent for the submission of AARP's brief *amicus curiae* is on file with the Clerk of the Court. Pursuant to SUP. CT. R. 37.6, AARP states that no counsel for any party authored this brief in whole or in part and that no party or entity other than AARP, its affiliates, or counsel made a monetary contribution to the preparation or submission of this brief.

savings they have spent years accumulating. The financial well-being of older Americans, secure in the knowledge that their retirement savings are protected even if bankruptcy becomes inescapable, is of substantial importance to AARP and its members.

This case is about the meaning of a single provision of the federal bankruptcy law. But the significance of this case, particularly for older Americans, lies not in the rules of statutory construction but with the desire of Congress to encourage and protect the retirement savings of all Americans. Are IRAs protected by statute, available, especially in retirement, to facilitate a debtor's self-support and keep the promise of 100 years of bankruptcy law? Or are they indistinguishable from fine jewelry or ordinary bank accounts that can be used to satisfy creditors?

Like the U.S. Courts of Appeal, the parties disagree on whether IRAs qualify for the exemption in 11 U.S.C. § 522(d)(10)(E). The U.S. Courts of Appeal have reached different judgments about what Congress intended. As a result, this is also a case about the purposes of the exemption in § 522(d)(10)(E) and the complementary goal of Congress in encouraging and facilitating retirement savings through the tax code.

Richard and Betty Jo Rousey filed for bankruptcy in 2001. Jill Jacoway, the Chapter 7 bankruptcy trustee for their case, objected to the Rouseys' claimed exemptions. The Rouseys established two IRAs with retirement funds "rolled over" from pension plans with their former employer. In deciding their case, this Court will consider whether the Rouseys' ability, consistent with the Internal Revenue Code, to withdraw money from these IRAs upon payment of a ten

percent penalty makes their IRAs – and the IRAs of millions of other Americans – ineligible for the exemption. If the Court concludes that some or all IRAs are subject to the claims of creditors as if they were ordinary bank accounts, it will consider the related question of whether the exemption in § 522(d)(10)(E) is available only to those presently withdrawing – or with the present right to withdraw – funds from their IRAs without penalty.

Section 522(d)(10)(E) exempts from the reach of creditors a debtor's "right to receive" any payments under a "stock bonus, pension, profitsharing, annuity, or similar plan or contract . . . to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." In short, it exempts income earned and saved but not yet paid.

IRAs are a critical source of retirement savings for the self-employed, workers without employer-sponsored retirement plans, and those who have rolled over distributions of plan benefits from former employers. Although IRA savings are modest for most Americans – the median IRA in 2003 held $30,000 for households with traditional IRAs only – they represent particularly important safeguards for individuals with no other retirement savings.

Under the decision of the U.S. Court of Appeals for the Eighth Circuit, all of these savings would be lost in bankruptcy. Under the interpretation mandated in the U.S. Court of Appeals for the Third Circuit, anyone under the age of 59½ would lose these savings. Neither is correct.

Older Americans who lose their IRAs in bankruptcy will have a sharply reduced ability to support themselves in their retirement years. Rebuilding retirement savings is a

daunting task for anyone, and it is particularly difficult for older Americans emerging from bankruptcy. Many older Americans have health issues that severely limit their ability to work. Those able to work often find that they need retraining to re-enter the workforce after years of initial retirement. Finding a job as an older American can be a difficult and disheartening undertaking. Even with statutory protection, age discrimination continues to be an obstacle. Older workers, even those with years of white-collar work experience, are likely to find only low wage jobs with significant reductions in pay. Basic living expenses consume their modest wages, leaving little, if anything, for savings.

Social Security is the major income source for two out of three older Americans and has been instrumental in lifting millions out of poverty. Yet these benefits are limited. For older Americans facing increasing medical and housing-related expenses, even modest savings make a substantial difference in retirement. Under the decisions at issue in this case, older Americans who have counted on IRAs for their retirement and who need to file for bankruptcy will lose even this modest measure of security.

Congress has made a deliberate decision to protect the ability of Americans to support themselves even after a severe personal economic reversal. It also has decided to encourage self-support in retirement by providing protection to retirement savings through both the tax code and the bankruptcy law. This protection has heightened importance for older Americans. It is not an academic or theoretical question. For thousands of older Americans, it is a matter of financial survival.

STATUTE AT ISSUE

11 U.S.C. § 522

(d) The following property may be exempted under subsection (b)(1) of this section:

* * * *

(10) The debtor's right to receive—

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;

(B) a veterans' benefit;

(C) a disability, illness, or unemployment benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless—

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

STATEMENT OF THE CASE

The Bankruptcy Reform Act of 1978 modernized federal bankruptcy law. *See* S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787. The result of nearly a decade of work, the Act changed both the substantive and procedural law of bankruptcy. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989). The law in § 522 established a set of federal exemptions that "permit an individual debtor to take out of the estate property that is necessary for a fresh start and for the support of himself and his dependents." H. Rep. No. 95-595, at 176 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6136; *see United States v. Security Industrial Bank*, 459 U.S. 70, 83 (1982) (Blackmun, J., dissenting). This case involves the scope of one portion of one exemption, 11 U.S.C. § 522(d)(10)(E), "the debtor's right to receive" payments from individual retirement accounts.

Richard and Betty Jo Rousey voluntarily filed a joint bankruptcy petition under Chapter 7 in April 2001. The Rouseys' assets included two IRAs valued at $42,915.32 and $12,118.16 in deposit accounts holding funds rolled over from their previous employer's pension plans approximately two years earlier. The Rouseys elected to use the federal exemptions in 11 U.S.C. § 522.[2] They claimed exemptions

[2] In states like Arkansas, where the Rouseys live, that have not opted out of the federal exemption system, debtors can choose either the exemptions in § 522(d) or the exemptions available under applicable state and nonbankruptcy federal law. Approximately 34 states have opted out the federal exemption system. 4 COLLIER ON BANKRUPTCY ¶ 522.01, at 522-11 (15th ed. rev. 2004). Some of the states that have opted out of the federal exemption plan use language that parallels § 522(d) in their state exemption law. *See id.*; *see, e.g., In re Huebner*, 986 F.2d

for their IRAs in the amount of $10,681 ($5,033 and $5,648, respectively, for the two IRAs) pursuant to § 522(d)(5), not at issue here, and exemptions for the remaining IRA amount of $44,352.48 ($37,882.32 and $6,470.16, respectively) pursuant to § 522(d)(10)(E). The bankruptcy trustee objected to the (d)(10)(E) exemptions but not to the (d)(5) exemptions.[3]

The principal question in this case is: Whether a debtor's right to receive payment from an IRA that qualifies under I.R.C. § 408 qualifies as "exempt property" under 11 U.S.C. § 522(d)(10)(E) of the Bankruptcy Code. The bankruptcy court found that the IRAs were not exempt under § 522(d)(10)(E), and the bankruptcy appellate panel affirmed. The Eighth Circuit ultimately affirmed the trustee's objection as well, although on narrower grounds than the lower courts had used.

A second question in this case arises only if the Court rules against the Rouseys on the first question: Whether the exemption for IRAs under 11 U.S.C. § 522(d)(10)(E) is available only where a debtor is receiving – or is eligible to

1222, 1224 (8th Cir. 1993) (Iowa statute); *In re Dubroff*, 119 F.3d 75, 78 (2nd Cir. 1997) (New York statute); *In re McKown*, 203 F.3d 1188, 1189 (9th Cir. 2000) (California law). Others expressly exempt IRAs. *See* 4 COLLIER ON BANKRUPTCY ¶ 522.09[10][b], at 522-64; *see, e.g., In re Yuhas*, 104 F.3d 612, 613 (3rd Cir. 1997) (New Jersey law); *In re Meehan*, 102 F.3d 1209, 1211 (11th Cir. 1997) (Georgia law).

[3] Section 522(d)(5) allows a debtor to exempt his "aggregate interest in any property, not to exceed in value $925 plus up to $8,725 of any unused amount of the exemption" under subsection (d)(1) for the debtor's residence or burial plot.

receive – payments in accordance with the Internal Revenue Code.[4] Courts in the U.S. Court of Appeals for the Third Circuit allow IRAs the exemption only where the debtor is at least age 59½ and, accordingly, statutorily eligible to receive payments from the IRA without penalty. This interpretation is based on a 1983 appellate decision in which the court found no basis in § 522(d) for Congressional concern for the debtor's long-term security. *See In re Clark*, 711 F.2d 21 (3rd Cir. 1983).

Four other Courts of Appeal have considered whether IRAs similar to the Rouseys' IRAs qualify for the exemption either under § 522(d)(10) or parallel state statutes. *See In re Carmichael*, 100 F.3d 375 (5th Cir. 1996); *In re Dubroff*, 119 F.3d 75 (2nd Cir. 1997); *In re McKown*, 203 F.3d 1188 (9th Cir. 2000); *In re Brucher*, 243 F.3d 242 (6th Cir. 2001). All four concluded that IRAs are eligible for the exemption. *See also* Pet. at 8 n.6 (listing bankruptcy courts in agreement). One appellate court also asked whether § 522(d)(10)(E) is limited to present payments and present rights to payments, concluding that the provision also protects the right to receive future payments even where no right to present payments exists. *See Carmichael*, 100 F.3d at 379.

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[4] This Court granted *certiorari* on the following question: "Should this Court grant *certiorari* to resolve the three way circuit conflict over whether and to what extent Individual Retirement Accounts (IRAs) are exempt from a bankruptcy estate under 11 U.S.C. § 522(d)(10)(E)." Therefore, this second question was in effect included in the petition, and it should be considered by the Court. *See* SUP. CT. R. 14.1(a).

SUMMARY OF THE ARGUMENT

The economic vulnerability of older Americans is a growing national tragedy. The rate of bankruptcy filings, which remains at record levels, is rising faster among those 55 and older than the general population. The rate of increase in filings is greatest among those 65 and older.

The practical consequences of the Court's decision will be significant as increasing numbers of Americans approaching retirement are faced, for the first time, with economic circumstances that leave them little choice but to file for bankruptcy. For the self-employed and millions of others without employer-sponsored retirement plans, often small business employees, IRAs are one of the few available retirement savings plans.

Under the Eighth Circuit's decision, the only IRAs that qualify for the exemption are those that limit withdrawals exclusively to circumstances of illness, disability, death, fixed age, or length of service. Yet the record contains no evidence of IRAs that do not permit withdrawals only in those circumstances. Because no IRAs meet the standard imposed by the Eighth Circuit, even modest retirement savings are lost in bankruptcy. For individuals in, or approaching, retirement – relying on IRAs as their principal or only source of retirement savings – the consequences of such a loss will be severe, particularly for those with limited work opportunities or health constraints.

The interpretation of § 522(d)(10)(E) used in the Third Circuit also has devastating consequences for debtors with IRAs. Under that rule, only individuals entitled to "present payments" from IRAs – that is, persons who already have

reached the age of 59½ and are entitled by statute to funds from their IRAs – may exempt IRA funds. Debtors 59½ or younger lose their IRAs in bankruptcy.

Both of these judicial interpretations erroneously read into § 522(d)(10)(E) limitations not present in the text of the statute. Nowhere does the statute limit the exemption to contracts or plans for which payments are made "only" on account of illness, disability, age, or length of service. And nothing in the exemption's language requires the present receipt of payments. To the contrary, Congress has authorized exemptions for the "right to receive" payments, leaving them available for individuals and families to support themselves after bankruptcy. The interpretations of the Eighth and Third Circuits collide with the provision's text, the statutory framework and Congressional intent.

ARGUMENT

Since Congress enacted the modern Bankruptcy Code in 1978, this Court has decided a litany of statutory construction cases, culminating in two decisions in just the last term.[5] In bankruptcy, like all cases involving statutory

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[5] *See, e.g., Security Industrial Bank*, 459 U.S. 70 (the effect of 11 U.S.C. § 522(f)(2) on certain types of property liens); *Ron Pair*, 489 U.S. 235 (whether 11 U.S.C. § 506(b) entitles some creditors to receive postpetition interest); *Grogan v. Garner*, 498 U.S. 279 (1991) (evidentiary standard for exceptions in 11 U.S.C. § 523(a)); *Patterson v. Shumate*, 504 U.S. 753 (1992) (meaning of "nonbankruptcy law" in 11 U.S.C. § 541 (c)(2)); *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994) (meaning of "reasonably equivalent value" in 11 U.S.C. § 548(a)(2)); *Bank of America Nat'l Trust & Sav. Ass'n v. 203 LaSalle St. P'ship*, 526 U.S. 434 (1999) (effect of 11 U.S.C. § 1129(b)(2)(B)(ii) on participation by old equity holders in "new value" transactions); *Lamie v. United*

interpretation, "[t]he starting point in discerning congressional intent is the existing statutory text." *Lamie v. United States Trustee*, 124 S. Ct. 1023, 1030 (2004). "'[W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'" *Id.* (*quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal citations omitted)).

The text of the statute here is plain and dispositive. Although the terms "IRA" or "Individual Retirement Account" do not appear in § 522(d)(10)(E), an IRA is a "plan or contract" providing for payments "on account of . . . age" that is "similar" to the plans and contracts specifically named in the provision. Subsection (iii) includes a reference to I.R.C. § 408, the section that sets forth requirements for IRAs to qualify for certain tax benefits, and it reinforces that plain language. Subsection (iii) denies the exemption to any "plan or contract" that "does not qualify" under I.R.C. § 408. *See* 11 U.S.C. § 522(d)(10)(E)(i)-(iii). There would be no need for this important reference to § 408 if IRAs were not covered by the exemption in the first place. IRAs in general and the Rouseys' IRAs specifically qualify under § 408.

The context of § 522 is equally compelling. The statute "exempt[s]" from property of the estate a limited amount of cash, other assets, rights and interests, leaving them in the hands of the debtor to begin a post-bankruptcy economic

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States Trustee, 124 S. Ct. 1023 (2004) (whether 11 U.S.C. § 330(a)(1) authorizes compensation to debtors' attorneys from estate funds); *Till*, 124 S. Ct. 1951 (appropriate rate of interest under 11 U.S.C. § 1325(a)(5)(B)(ii) due certain creditors).

life. Some exemptions, like "professional books" and the "tools of the [debtor's] trade," are specifically intended to preserve the debtor's ability to earn or receive income in the future. So are the specific exemptions for Social Security, unemployment, disability, and other benefits in § 522(d)(10)(A)-(D).

Congress was acutely aware that a bankruptcy law that left a debtor stripped bare, unable to earn a living, would not advance one of the principal goals of the Code: to ensure that debtors could quickly become not only technically solvent but self-supporting.[6] Without that, individuals and families emerging from bankruptcy would be forced to depend on charity or the government. By protecting retirement accounts, no less than tools of the trade and Social Security payments, Congress has advanced that same goal: making it easier for older Americans to support themselves when their prime earning years have passed.

Congress has clearly expressed its intent to facilitate, to encourage and to protect retirement savings, whether they are in IRAs or another recognized plan. It has done that by providing favorable tax treatment for retirement savings. When the language of the Bankruptcy Code is so clear, especially with its explicit reference to the Internal Revenue Code, no court should be tempted to take away the benefits

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[6] The importance of exemptions in personal bankruptcy is a concept at least as old as the United States itself: "Only non-exempt property could be taken in execution, which in most colonies and states meant that some, usually small, portion of clothing, bedding, necessary household items, farm implements, and tools of a trade were shielded from seizure." Bruce H. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* 30 (2002).

that Congress has provided, especially for individuals and families trying to support themselves after bankruptcy.

I. A DEBTOR'S RIGHT TO RECEIVE PAYMENT FROM AN IRA THAT COMPLIES WITH THE INTERNAL REVENUE CODE SHOULD AUTOMATICALLY QUALIFY AS "EXEMPT PROPERTY."

Section 522(d)(10)(E) authorizes a debtor to exempt from the bankruptcy estate the debtor's "right to receive . . . a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service . . . ."[7] 11 U.S.C. § 522(d)(10)(E). The same section *excludes* from the exemption a plan or contract which: "(i) . . . was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose; (ii) such payment is on account of age or length of service; *and* (iii) such plan or contract does *not* qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986." 11 U.S.C. § 522(d)(10)(E) (emphasis added). IRAs that meet the requirements of I.R.C.

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[7] This exemption is limited to amounts "reasonably necessary for the support of the debtor and any dependent of the debtor . . . ." The Eighth Circuit did not address this provision, and it is not at issue here. However, the "reasonably necessary" requirement reinforces the exemption's compatibility with the purposes of the consumer bankruptcy statute. The limitation prevents the use of an IRA "or similar plan or contract" as a shelter to defraud creditors. Yet, limited to the funds reasonably necessary for a family's support, the exemption makes self-sufficiency and economic recovery possible.

§ 408 qualify for the exemption. The Rouseys' IRAs meet those requirements. Most IRAs do.

A. The Plain Language Of § 522(d)(10)(E)(iii) Should Leave No Doubt That IRAs, As "Similar Plans Or Contracts," Qualify For The Exemption.

The application of § 522(d)(10)(E)(iii) properly "begins where all such inquires must begin: with the language of the statute itself." *Ron Pair*, 489 U.S. at 241 (*citing Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985)). And this is also where the inquiry should end. *Id.*

The explicit reference to I.R.C. § 408 in § 522(d)(10)(E)(iii) is dispositive. An IRA that does not qualify under the Internal Revenue Code does not qualify for the exemption. Accordingly, a qualifying IRA should trigger the exemption as long as it is "similar" to a "stock bonus, pension, profitsharing, [or] annuity" plan. An IRA that meets Internal Revenue Code requirements – which include provisions for penalty-free payments based on age, death, or disability, *see* I.R.C. §§ 408(d), 72(t) – falls squarely within the exemption's scope. Far from excluding IRAs from the exemption, Congress at the very least made them eligible for the exemption.

Congress used the term "plan or contract" in both the exemption and in its limiting provision, subsection (iii). The only logical reading of section 522(d)(10)(E) is that an IRA that qualifies by reference under I.R.C. § 408 is a "similar plan or contract" under the exemption. *See Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that 'identical

words used in different parts of the same act are intended to have the same meaning'") (*quoting Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)) (internal citations omitted).[8] Section 522(d)(10)(E)(iii) limits the exemption. There would be no need for the reference to § 408, requiring compliance to qualify for the exemption, if IRAs had already been excluded from the provision and were, therefore, not covered by the exemption in the first place.

Each word in a statute has meaning. *See Dunn v. CFTC*, 519 U.S. 465, 472 (1997) ("Our reading of the exemption is therefore also consonant with the doctrine that legislative enactments should not be construed to render their provisions mere surplusage"); *see also* 2A Norman J. Singer, Statutes and Statutory Construction § 46:06 (6th ed. 2000). By contrast, the Eighth Circuit's decision renders meaningless the reference to § 408 in subparagraph (iii).

If IRAs can never be exempted under § 522, there would be no qualified and, therefore, exempt § 408 plans or contracts to distinguish from non-qualified and, therefore, non-exempt plans. The reference to § 408 in subparagraph (iii) would be "mere surplusage." Unlike the provision at issue in *Lamie*, 124 S. Ct. at 1031, treating the reference to § 408 as surplusage here would create – rather than resolve – ambiguity. Nor is there any evidence that the reference to §

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[8] *See also Commissioner v. Lundy*, 516 U.S. 235, 249-250 (1996) ("[W]e have been given no reason to believe that Congress meant the term 'claim' to mean one thing in [11 U.S.C.] § 6511 but to mean something else altogether in the very next section of the statute"); *Bank of America*, 526 U.S. at 451 ("[A] given phrase is meant to carry a given concept in a single statute").

408 is a drafting error. *Cf. Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001). Accordingly, there is no basis to depart from the well-established principle that a statute should not be construed to render any of its words surplusage.

B. IRAs Are Sufficiently Similar To The Four Types Of Plans Or Contracts Listed In § 522(d)(10)(E) To Qualify As Exempt.

Congress enacted § 522 "to permit an individual debtor to take out of the estate that property which is necessary for a fresh start and for the support of himself and his dependents." H. Rep. No. 95-595, at 176, *reprinted in* 1978 U.S.C.C.A.N. at 6136. The provisions of § 522(d)(10) "exempt[] certain benefits that are akin to future earnings of the debtor." H. Rep. No. 95-595, at 362, *reprinted in* 1978 U.S.C.C.A.N. at 6318. The four types of contracts or plans expressly named in subparagraph (d)(10)(E) as *per se* exempt are substitutes for future earnings. IRAs serve the same purpose.

Even were the text of § 522(d)(10)(D) otherwise ambiguous on the scope of the IRA exemption, the Rouseys' IRA – and IRAs generally – are plans or contracts "similar" to stock bonus, pension, profitsharing, and annuity plans or contracts from which payments are made on account of illness, disability, death, age, or length of service. While § 522 obviously does not use the term "IRA" or "individual retirement account," it uses the phrase "similar plan or contract" to expand the reach of the exemption. The purpose of both § 522 and I.R.C. § 408, the provision authorizing IRAs, demonstrates that IRAs are "similar" plans or

contracts. The Eighth Circuit appears to concede as much. *See* Pet. App. at 5a.

Congress first authorized IRAs in 1974. These first IRAs extended some of the tax benefits of employer pension plans to those whose employers did not have such plans. The statute authorized a deduction for up to 20 percent of earned income, not to exceed $1,500, "for retirement savings." H. Conf. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5115; *see id., reprinted in* 1974 U.S.C.C.A.N. at 5122 (proceeds of IRAs "are to constitute retirement income for purposes of the retirement income credit"). The statute also authorized tax-free rollovers into IRAs to facilitate pension portability and transfers. *See id., reprinted in* 1974 U.S.C.C.A.N. at 5121-22; *see generally* H. Rep. No. 93-807 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4671; S. Rep. No. 93-383 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4898.

Congress made IRAs universally available in 1981 as a general incentive to save for retirement and increased the contribution amounts eligible for a tax deduction. *See* S. Rep. No. 97-144, at 112 (1981), *reprinted in* 1981 U.S.C.C.A.N. 105, 214 ("The Committee is concerned that the resources available to individuals who retire are often not adequate to avoid a substantial decrease from preretirement living standards. . . . [R]etirement savings by individuals can make an important contribution . . . [and] the present level of individual savings is too often inadequate for this purpose"); *id.* at 215 (The bill "is designed to promote greater retirement security").

Congress also has made the IRA the investment vehicle for simplified employee pensions, *see* I.R.C. § 408(k), and

for simple retirement accounts, *see* I.R.C. § 408(p) – that is, retirement plans specifically designed to provide employees of small employers access to retirement alternatives similar to those available to employees of larger employers. In 2001, Congress authorized transfers of funds from IRAs to qualified plans, such as 401(k) plans, *see* I.R.C. § 408(d)(3), a further example of the Congressional efforts to facilitate portability and encourage retirement savings. Through these and other provisions of § 408, Congress has created substantial incentives for the use of IRAs.

The incentives have worked. More than 45 million taxpayers have IRAs. According to a recent Congressional Research Service Report, IRA savings have grown steadily from $85 billion in 1983 to $2.5 trillion at the end of 2001. *See* Paul J. Graney, *Individual Retirement Accounts: A Fact Sheet, CRS Report for Congress*, Code 94-83 EPW (Dec. 5, 2003). New contributions, however, have not been the main source of this growth. While new contributions accounted for 81 percent of the growth in IRA assets in 1984, they accounted for only about two percent of growth in the late 1990s. A key reason for this shift has been the steady stream of asset rollovers from employer pension plans to IRAs. *Id.*

The Rouseys established their IRAs the same way many older workers did; they used funds rolled over from their Northrop Grumman plans maintained by their former employer. Pet. App. at 2a, 8a.[9] Indeed, older workers have

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[9] As one of the judges on the Bankruptcy Appellate Panel that heard the Rouseys' appeal acknowledged, their "pensions would have been exempt had they filed their bankruptcy petition while employed by Northrop Grumman." Pet. App. at 18a.

more IRA plans than any other age group because the bulk of IRA assets are rolled over from previous pensions. *See* Jules H. Lichtenstein and Satyendra Verma, *Older Workers' Pension Plan and IRA Coverage*, at 3 (Oct. 2003), at http://research.aarp.org/econ/dd91_retire.pdf, and *Retirement Plan Coverage of Baby Boomers & Retired Workers: Analysis of 1998 SIPP Data*, at 13-14 (July 2003), at http://research.aarp.org/econ/ 2003_10_98sipp.pdf.

For the Rouseys and millions of other older Americans, the IRA became an indispensable part of retirement planning. More than four million Americans aged 53-64 – that is, almost 25 percent of that age group – maintain an IRA at least partially funded from an employer pension plan. Lichtenstein and Verma, *1998 SIPP Data*, at 14. IRAs are also a key component of retirement planning for the more than two million Americans aged 53-64 who have never had a pension plan. *See id.*

An IRS study of tax year 2000 returns emphasizes the importance of IRAs in the retirement planning of older Americans. It found that 39 percent of taxpayers aged 50-60 have IRAs, and the average value of these IRAs was $64,701. Peter J. Sailer and Sarah E. Nutter, *Accumulation and Distribution of Individual Retirement Arrangements, 2000*, at 126, 134 (Spring 2004), at http://www.irs.gov/pub/irs-soi/00retire.pdf. More recent data reinforce the importance of IRAs, particularly for older Americans. The median age of heads of households with traditional IRAs was 52. *See* Investment Company Institute, *IRA Ownership in 2003*, Fundamentals, Sept. 2003, at http://www.ici.org/stats/res/fm-v12n3.pdf. The median assets held in IRAs totaled $30,000 for households with traditional IRAs and $20,000 for households with any type of IRA. *Id.*

IRA payments that meet the requirements of § 408 are functionally the same as a stock bonus, pension, profitsharing, and annuity plan or contract. They are the functional equivalent as well of the Social Security, unemployment, and disability payments exempted under the statute. Congress repeatedly has expressed its concern for the retirement security of Americans. To that end, it has created specific benefits and savings incentives for self-employed individuals, individuals without employer-based pension plans, and those like the Rouseys who, consistent with § 408, rolled funds from pension and other exempt funds into IRAs when those plans terminated or employment ended.

Congress has utilized the IRA "to serve as a sort of universal conductor through which transfers must pass if they are to avoid the rocks and shoals of inadvertent taxable events." *Carmichael*, 100 F.3d at 378. Section 522 cannot be read, literally or logically, to exclude IRAs that qualify under § 408. IRAs should remain a recognized and valuable vehicle for retirement savings, not a trap for honest taxpayers who utilize § 408 for pension rollovers and other fund transfers intended for retirement only to lose them in bankruptcy.

C. The Exemption In § 522(d)(10)(E) Is Not Limited To Plans Or Contracts That Permit Payments Only Based On Illness, Disability, Death, Age, Or Length Of Service.

Both the text and purpose of § 522(d)(10)(E) demonstrate that IRAs that qualify under § 408 also should qualify for the exemption. Yet, under the Eighth Circuit's interpretation, the Rouseys' IRAs do not qualify because

they permit withdrawals prior to age 59½ if a ten percent penalty is paid. This conclusion categorically excludes IRAs from the exemption along with a number of stock bonus, pension, profitsharing, and annuity plans and contracts because at least some permit withdrawals prior to age 59½ with a ten percent penalty. *See* I.R.C. § 72. Whether this limitation applies only to IRAs, or to all "similar" plans or contracts, the result is contrary to both the text and purpose of § 522.

IRA holders may make early withdrawals subject to a tax penalty. That is not, however, a statutory basis for denying the bankruptcy exemption's protection to IRAs. By tax law, "the right to receive payments" from an IRA without penalty can be triggered by four events: reaching age 59½, death, disability or medical care. *See* I.R.C. §§ 408, 72(t). These four events mirror the first four of the five triggering events in the bankruptcy exemption (excluding "length of service").

To qualify for the exemption, the statute requires that the plan or contract give the debtor a right to receive payments on account of illness, disability, death, age, *or* length of service. The statute does not require that any – or all – of the tests be the strict or exclusive method of triggering a repayment, only that repayment can be triggered by at least one of these events. The only limitations imposed by the Bankruptcy Code apply to plans that are not qualified under the enumerated IRA provision. The Rouseys' IRAs qualify under § 408 and thus meet the standard set forth in the Bankruptcy Code.

In concluding otherwise, the Eighth Circuit ignored the plain language of the bankruptcy statute. The appellate court impermissibly read into the statute a requirement that the

right to receive payment be conditioned solely on one of the events listed in § 522(d)(10)(E) – a limitation that does not appear in the text.

The bankruptcy court below acknowledged that few, if any, IRAs could meet this requirement. *See* Pet. App. 33a n.5. The lower court's suggestion that IRAs somehow "could" comply with the Eighth Circuit's standard by including a spendthrift provision[10] illustrates the flawed logic of its interpretation. If an IRA had a valid spendthrift provision, the IRA would be excluded from the estate entirely under 11 U.S.C. § 541(c)(2). *See* 4 COLLIER ON BANKRUPTCY ¶ 522.09[10][b], at 522-62; *see also Patterson*, 504 U.S. at 762 ("§ 522(d)(10)(E) exempts from the bankruptcy estate a much broader category of interests than § 541(c)(2) excludes").[11] Under the Eighth Circuit's reading,

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[10] "Spendthrift trusts" are authorized in most states. In Arkansas, for example, they include "[a]ny retirement plan which meets the requirements of § 401 or § 403 of the Internal Revenue Code of 1986, as amended, which contains a prohibition against alienation[,] and a prohibition against attachment shall be conclusively presumed for the purposes of Arkansas law to be a spendthrift trust." Ark. Code § 28-69-501 (2003). A spendthrift trust can only be created in Arkansas by an express restraint on alienation. *See Sanders v. Putman*, 866 S.W.2d 827, 254 (Ark. 1993).

[11] Section 541 of the Bankruptcy Code creates the bankruptcy estate, which consists of all the property that will be subject to the jurisdiction of the bankruptcy court. *See* 5 COLLIER ON BANKRUPTCY ¶ 541.01, at 541-7. Section 541(c)(2) excludes from the bankruptcy estate property of the debtor that is subject to a restriction transfer enforceable under "applicable non-bankruptcy law." *See Patterson*, 504 U.S. at 755. Although some courts have held that IRAs that meet the requirements of § 541(c)(2) are completely excluded from the estate, that issue is not before the Court. *See* 4 COLLIER ON BANKRUPTCY ¶ 522.09[10][b], at 522-64; *see, e.g., Yuhas*, 104 F.3d at 614.

the only IRAs that would qualify for the exemption in § 522 are IRAs that would not be part of the bankruptcy estate at all. *See* 11 U.S.C. § 541. The plain language of § 522(d)(10)(E)(iii) leaves no doubt that IRAs are subject to the exemption.[12] The Eighth Circuit's approach is not just contrary to the text, but illogical. *See Ron Pair*, 489 U.S. at 241; *see also Dubroff*, 119 F.3d at 76.

In addition, the Eighth Circuit's suggestion that retirement contracts or plans might qualify for the exemption if access to them were limited by more than "modest early withdrawal tax penalties," Pet. App. at 6a, lacks support both in fact and in law. Contrary to the lower courts' assumption, a 10 percent penalty is an effective deterrent to early withdrawal. In 1987, for example, nearly $6.5 million dollars had been deposited in IRAs in the nation's credit unions. Yet, that year, only 1.2 percent of that total was withdrawn early enough to trigger a penalty, only 1.27 percent in 1988. *See In re Cilek*, 115 B.R. 974, 988 n.15 (Bankr. W.D. Wis. 1990). Even if some basis existed in fact to distinguish between the deterrent value of different penalty levels, the text of the statute does not support such distinctions. If an IRA complies with the requirements of § 408 and provides that "the right to receive payments" is triggered by one or more of the events listed in § 522(d)(10)(E), it qualifies for the exemption.

The decision on appeal has consequences far beyond its application to IRAs. The ability to withdraw funds prior to reaching 59½ years of age is characteristic of IRAs

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[12] The amount of the exemption remains limited, of course, by the "reasonably necessary" standard.

generally, but it is commonly found in at least some of the four types of plans specifically listed in subsection (d)(10)(E). *See* I.R.C. §§ 401, 403, 72(q), (t).[13] Section 522 authorizes an exemption for "[t]he debtor's *right to receive*" "a *payment* under a stock bonus, pension, profitsharing, annuity, or similar plan or contract *on account of* illness, disability, death, age, or length of service . . . ." 11 U.S.C. § 522(d)(10)(E) (emphasis added). The qualifying phrase "on account of" means that the debtor's right to receive a payment from one of the five sources must be attributable to illness, disability, death, age, or length of service. *See Bank of America*, 526 U.S. at 450 (noting that the common understanding of "on account of" in § 522(d)(10)(E) and other provisions in the code means "because of"). The grammatical structure of the sentence makes the qualifier applicable equally to each of the five possible sources of payments, not only to IRAs and "similar" plans. Limiting the exemption to plans or contracts that permit payments based only on the listed triggering events would drastically curtail the scope of the exemption and destroy the core purpose of § 522(d)(10)(E): protecting "benefits akin to future earnings."

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[13] Those plans or contracts that do permit withdrawals prior to age 59½ generally include vesting requirements that impose additional penalties for premature withdrawals. After an individual's interest has vested, however, withdrawals are subject only to the same 10 percent early withdrawal penalty that affects IRAs.

D. The IRA Exemption Is Indispensable For Older Americans With Less Time To Re-Establish Self-Sufficiency After Bankruptcy.

The number of Americans age 50 and older who are filing for bankruptcy is growing rapidly. The rate of increase in filings is greatest among Americans age 65 and older. *See generally* Teresa A. Sullivan, Deborah Thorne & Elizabeth Warren, *Young, Old, and In Between: Who Files for Bankruptcy?* Norton Bankr. L. Advisor, 1, 8, Sept. 2001; *see* Suein Hwang, *New Group Swells Bankruptcy Court: The Middle-Aged*, Wall Street Journal, Aug. 6, 2004, at 1A. By contrast, younger bankruptcy filers tend to have accumulated too much debt while starting jobs and families, leaving them without enough savings to carry them through lean times. Older Americans generally file for bankruptcy after struggling with one or more crises that upset their financial planning. For them, the modest savings in an IRA can mean the difference between relying on Social Security alone and having some modest additional means to help them cope with the many financial pressures of aging.

A need to provide financial assistance to a family member or to stay home to care for one, a job layoff or forced retirement, or a health related crises such as catastrophic illness or work-related disabilities – all precipitate bankruptcy filings by older Americans. Because the personal savings rate for older Americans, like Americans in general, has continued to decline, these "financial transitions" can be far-reaching enough that the lives of those experiencing them may never be the same. Sophie M. Korczyk, *How Americans Save*, at 1, 28-32, 39 (July 1998), at http://research.aarp.org/econ/9806_save.html; *see also* Verma and Lichtenstein, *The Declining Personal*

Savings Rate: Is There Cause for Alarm?, at 7 (March 2000), at http://research.aarp.org/econ/ib42_alarm.pdf. Even if a person is able to avoid bankruptcy, experiencing one of these crises is a harbinger for vulnerability in retirement. *See* Korczyk at 32.

Consequently, medical problems and the financial stresses of aging often leave Americans, especially those 65 and older, with no choice but to file for bankruptcy. In 2001, at least 20 percent of all Social Security beneficiaries (aged 65 and older) relied on Social Security for 100 percent of their income. Social Security Administration, *Fast Facts & Figures About Social Security*, at 7 (June 2003), at http://www.ssa.gov/policy/docs/chartbooks/fast_facts/2003/ff2003.pdf. Nearly 38 percent of beneficiaries over 65 received 90 percent or more of their income from Social Security. Ke Bin Wu, *Income of Older Americans in 2001: A Chartbook*, at 27 (Aug. 2003), at http://research.aarp.org/econ/ip_cb2001.pdf. The average monthly Social Security benefit for a single retired worker in 2003 was $922 – or 123 percent of the federal poverty guidelines. Although the average monthly benefit in 2003 for a retired worker with an aged spouse was $1,523, the average benefit for a aged widow or widower in 2003 was $888. *See* Social Security Administration, *Legislative Fact Sheet: 2004 Social Security/SSI Information*, (Dec. 31, 2003), at http://www.socialsecurity.gov/legislation/2004_factsheet.doc; *see* 2003 HHS Poverty Guidelines, 68 Fed. Reg. 6456, 6456-58 (Feb. 7, 2003).

Even when an older American has income beyond Social Security benefits, the pressures of deteriorating health and increasing housing-related costs can become overwhelming. In a 2000 study, almost 50 percent of debtors 65 and older

listed a medical reason for the filing, compared with just 7.5 percent of debtors 25 and older. *See* Melissa Jacoby, Teresa Sullivan and Elizabeth Warren, *Medical Problems & Bankruptcy Filings*, Norton Bankr. L. Advisor, 1, May 2000. The pressures of medical costs on older consumers are undeniable. In 2001, health expenditures were the only category where the average expenditure for older consumers exceeded that of all consumers. George Gaberlavage *et al.*, *Beyond 50.04: A Report to the Nation on Consumers in the Marketplace*, at 69 (May 2004), at http://research.aarp.org/consume/beyond_50_cons.html. Expenditures by older consumers on health care accounted for almost $7 of every $10 spent by all consumers for health care in 2001. *Id.*

The daily cost of living increases sharply when retired people are faced with rising costs in other areas. Older consumers, because their homes tend to be older, spend more than average on housing maintenance, repairs, and insurance costs. *Id.* at 66-68. They also spend more than the average for utilities and property taxes. *Id.* Sudden or major repair costs can force them to borrow – and, eventually, leave them no choice but to file for bankruptcy.

For the typical older American emerging from bankruptcy, trying to rebuild savings in their 50s, 60s, or beyond will be difficult at best. Whether they have filed for bankruptcy or not, older workers face special challenges in obtaining employment. When older workers look for a job, it typically takes them longer to find one. *See* Sara E. Rix, *Update on the Older Worker: 2003*, at 2 (June 2004), at http://research.aarp.org/econ/dd97_worker.pdf. Many older Americans become "discouraged workers" – not actively seeking a job because they do not believe work is available, think they lack the necessary background, fear employers

will think them too old, or anticipate some other form of discrimination. *Id.* at 2-3. And discrimination against older Americans in fact continues to be a problem. Rix, *Aging and Work—A View From the United States*, at 14-16 (Feb. 2004), at http://research.aarp.org/econ/2004_02_work.pdf; Rix, *Update 2003*, at 3; U.S. Equal Employment Opportunity Commission, *Age Discrimination in Employment Act (ADEA) Charges, FY 1992-2003*, at http://www.eeoc.gov/stats/adea.html.

If an older American, particularly a displaced worker, is able to obtain a job, it is likely to be a lower paying one at a significant wage loss. *See* Rix, *Update 2003*, at 2-3; Rix, *Aging and Work*, at 10, 17-18. Moreover, basic living expenses often consume their wages, leaving very little, if anything for savings. For those older Americans unable to work because of failing health, caretaker responsibilities or other limitations, the future is likely to be particularly bleak. For them, an exempt IRA will allow them some modest additional means to cope with the many financial pressures of aging.

II. THE EXEMPTION IN § 522(d)(10)(E) FOR IRAs INCLUDES A DEBTOR'S RIGHT TO RECEIVE FUTURE PAYMENTS FROM A QUALIFIED IRA.

In the Third Circuit, courts limit the availability of the exemption in § 522(d) to debtors receiving, or eligible to receive, payments in accordance with the age, illness, disability, or death provisions of I.R.C. §§ 408, 72(t). In other words, a debtor with an IRA in the Third Circuit qualifies for the exemption only if he or she has reached the age of 59½. *See In re Clark*, 711 F.2d 21 (3rd Cir. 1983); *see*

also In re Velis, 949 F.2d 78 (3rd Cir. 1991). *Clark* involved payments from a different type of retirement plan, Keoghs.[14] Although *Velis* did not directly rule on whether *Clark* applies to IRAs, bankruptcy courts in the Third Circuit continue to take the position that the exemption is available only to IRA holders who have reached the age of 59½. *See, e.g., In re Fulton*, 240 B.R. 854 (Bankr. W.D. Pa. 1999).

The Third Circuit's statutory interpretation is inconsistent with both the text and purpose of § 522(d)(10)(E). Yet, if this Court does not conclude that all IRAs qualify for § 522's exemption, it should at least affirm the Third Circuit's approach.

Once again, the language of the statute does not support the age-based distinction imposed by the Third Circuit. Nothing in § 522(d)(10)(E) limits the scope of the exemption to persons who have reached the age of 59½. To qualify for the exemption, the statute's language does not require ongoing payments from the IRA at the time of the bankruptcy petition or even present rights to receive such payments. The statute uses the term "right to receive . . . a payment," a phrase that necessarily encompasses both present and future rights. Nothing in the language chosen by Congress suggests that this right is limited to present payments. By contrast, the application of § 522(d)(10)(E) to both present and future payments is consistent with Congress' express purpose in enacting the exemption: to permit an individual debtor to take out of the estate property necessary to sustain herself, including "certain benefits that

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[14] The Fifth Circuit has characterized the *Clark* decision as "obsolete." *Carmichael*, 100 F.3d at 380.

are akin to future earnings of the debtor." H. Rep. No. 95-595, at 362, *reprinted in* 1978 U.S.C.C.A.N. at 6318.

IRAs are an important part – for some, an essential part – of preparation for retirement. The challenges faced by older Americans in a bankruptcy proceeding are substantial. Depriving persons under the age of 59½ of their IRAs is simply not consistent with Congress' concern for the retirement needs of self-employed individuals, individuals without employer-based retirement plans, and individuals who have rolled pension or other plans into an IRA. A 58-year old person is not significantly better able to recover from the loss of an IRA than a 59½-year old with a present right to payment under an IRA.[15] Both the plain language of the statute and Congress' clearly expressed intent dictate that both present and future rights to payment under an IRA should be eligible for the exemption in § 522(d)(10)(E).

CONCLUSION

For the foregoing reasons, AARP joins the Rouseys in asking this Court to reverse the decision of the U.S. Court of Appeals for the Eighth Circuit and, if the Court is unable to do that, affirm the interpretation in use in the U.S. Court of Appeals for the Third Circuit.

Respectfully submitted,

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[15] Of course, If the circumstances of an individual debtor – whether the debtor is 58 or 65 – indicate that the IRA is not needed for future support, § 522(d)(10)(E) authorizes the trustee to limit the exemption only to amounts "reasonably necessary" for the future support of the debtor and any dependents.

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